

U. S. Bankruptcy Court  
MIDDLE DISTRICT OF TENNESSEE (Nashville)  
Adversary Proceeding #3:13-ap-90400

**Plaintiff:**

MarketGraphics Research Group, Inc.,  
357 Riverside Drive, Suite 210  
Franklin, TN 37064

**Defendant:**

David Peter Berge, David Berge  
1345 Bell Road  
Antioch, TN 37013

TRANSCRIPT OF PROCEEDINGS

March 31, 2016

Before The Honorable Marian F. Harrison, Bankruptcy Judge

APPEARANCES

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1 THE COURT: Be seated, please. Go ahead  
2 and call the case.

3 CLERK: David Berge, Adversary 13-90400.

4 THE COURT: All right, anyone want to  
5 make a statement or just put on witnesses?

6 MR. KROG: Your Honor, we're prepared to  
7 make a brief opening statement.

8 THE COURT: Okay.

9 MR. KROG: We can waive that if you'd  
10 like. We did have, Your Honor, a motion to seal certain  
11 trial exhibits. I don't think you'd object to that.

12 MR. LEFKOVITZ: No.

13 THE COURT: Okay.

14 MR. KROG: Thank you, Your Honor. Paul  
15 Krog -

16 THE COURT: I think all of them have been  
17 uploaded, haven't they? Did you tell me all of them had been  
18 -

19 MR. KROG: There are some voluminous  
20 ones, Your Honor, that I have tried in the past to submit by  
21 that system and they simply do not have.

22 THE COURT: I was just thinking about  
23 your seal thing. Go ahead.

24 MR. KROG: Then I'd move into evidence  
25 the stipulated exhibits, and in addition to -

1 THE COURT: Which are? Which ones?

2 MR. KROG: Many of them, actually, Your  
3 Honor.

4 THE COURT: Do you have it to present to  
5 me so that I can see it?

6 MR. KROG: I do, Your Honor. Most of  
7 them have been pre-marked and then Mr. Lefkovitz has agreed  
8 to stipulate several of the ones that we submitted, not  
9 marked but stipulated. I'll give this list to Your Honor.

10 THE COURT: All right.

11 MR. KROG: If I may approach.

12 THE COURT: You may. So, the ones with  
13 an X have been stipulated; is that right?

14 MR. KROG: Yes, Your Honor. And I  
15 believe, according to the stipulation we filed, also Exhibit  
16 52, which is one of the voluminous exhibits that wouldn't go  
17 by the ECF System would qualify. That was the Reanalysis Q2  
18 Book (phonetic).

19 THE COURT: That's stipulated, too?

20 MR. KROG: Yes, Your Honor.

21 THE COURT: Okay. Make your statement.

22 MR. KROG: If I could have the screen,  
23 please. Your Honor, this is a case under 523(A)(6) regarding  
24 the effects of an effort to (inaudible - glitch on disc)  
25 clients in violation of Code against competition. That



1 effort had two players, Mr. David Berge and Mr. Donald Berge.  
2 And the Court will hear from both of them today. And between  
3 their testimony and the exhibits, Your Honor, might hear some  
4 conflicts between their versions of how this effort went. I  
5 believe that's the Defendant's main theory of the case.

6                   The Defendant says that his father was  
7 driving the bus and his father had, at one point, said that  
8 David was driving the bus. It's our position that the Court  
9 need not resolve that conflict because the testimony and the  
10 evidence will show that the Defendant, the younger Mr. Berge,  
11 knew he was on the bus.

12                   As I mentioned, this is a 523(A)(6) case.  
13 As the Court knows, that means we have these two elements  
14 that are laid out in the statute, willful and malicious. And  
15 the willful standard is that the thing is intentional. You  
16 desire the consequences of your act or you know them to be  
17 substantially certain to result. And the Sixth Circuit made  
18 it very clear that this is the test that is developing from  
19 the restatement in the Markowitz Case, which we looked at  
20 previously. In the language from its holding down here  
21 towards the end of the Opinion, based on the Supreme Court's  
22 (inaudible) and he quotes the second restatement of tort,  
23 Section 8(A), the actor desires to cause consequences of this  
24 act or the (inaudible) consequences are substantially certain  
25 to result from it. And it's a disjunctive test. You don't

1 have to desire the consequences and you don't have to know  
2 they're going to result. Either problem with that suffices.  
3 And that's how the restatement itself plays it out. Comments  
4 make that very clear. And that's how other courts treating  
5 intentional torts view the topic of intent that's the law in  
6 Tennessee, for instance.

7

8                   Then there's malicious. And malicious  
9 isn't ill will, spite, depraved heart. That just means that  
10 you've acted in conscious disregard of your duties, of  
11 someone else's rights, or without just cause or excuse. And  
12 that language, that test, is from the older Wheeler versus  
13 Lardoni case, and they cited a long body of case law when  
14 they adopted that test. But that case, the test, even the  
15 part of Wheeler has been overruled by Geiger, this test  
16 survives and we've seen the Bankruptcy Appellate Panel cited  
17 much more recently in 2012 in the Cunningham Case. Here they  
18 are cited to the Wheeler standard before. And that's a  
19 standard that is essentially analogous to what's the  
20 (inaudible) in most circuits, most courts around the country.

21                   You don't have to be a criminal  
22 mastermind for your conduct to qualify as malicious  
23 infliction of injury. We can discuss later the cases. You  
24 just have to participate in the undertaking and know what  
25 you're doing, know who the undertaking is harmful - if your

1 participation rises to the standard of conscious disregard or  
2 being without just cause or excuse, and undertaking as a  
3 whole is injurious and you know that, well the fact that  
4 you're in there following somebody else's lead, that won't  
5 get you off the hook.

6 I was reading recently the old color  
7 karate book Pinnochio to my children and most of us know the  
8 Disney version from the 40's. And end of the book and the  
9 movie, they get on the wagon to Funland. They don't drive  
10 the wagon; they don't operate Funland. But they get there  
11 and they know where they're going and they know they're  
12 supposed to be in school, and at least in the book, they both  
13 wind up jackasses. And without any intent to use the term as  
14 a derogatory aspersion, I think what we'll see here is  
15 somewhat similar, that Mr. Berge knew he was driving this  
16 Realisis business, he knew he had driven somewhere else.  
17 Thank you, Your Honor.

18 MR. LEFKOVITZ: Your Honor, Steve  
19 Lefkovitz for the Defendant, and I'll be very, very brief.  
20 The argument that Mr. Krog just made is the same argument  
21 that he made prior to Your Honor's exhaustive ruling on  
22 September 30, 2014 when he entered a motion for summary  
23 judgment.

24 He went on to argue that Judge Trauger's  
25 Order found both willful and malicious. His argument was the



1 same then as it is today. The proof, if you look at this  
2 exhaustive proof, you would think that Donald Berge is the  
3 Defendant in this case and we are in the United States  
4 Bankruptcy Court for the Northern District of Mississippi in  
5 Aberdeen. No, we are here in Nashville and we're still in  
6 Nashville, and we are trying the case of David Berge.

7 Now, Your Honor, has ruled in a  
8 memorandum opinion that the issue that needs to be decided is  
9 not whether or not there is a willful violation but did David  
10 Berge act maliciously. Now, we're going to hear tremendous  
11 proof about what Don Berge did and that is the issue that's  
12 at the (inaudible) of the proof.

13 If you look at all their witness list,  
14 emails from Don, Don to, communications with Don, Don to.  
15 And what they have regarding David Berge is a Facebook Page  
16 and a LinkIn Profile. That is not malicious and the case  
17 should be dismissed and Mr. Berge should get his (inaudible).

18 THE COURT: Call your first witness. You  
19 don't want the rule?

20 MR. KROG: I would like the rule.

21 MR. LEFKOVITZ: I want the rule.

22 THE COURT: Any witnesses other than the  
23 one he's getting ready to call need to step outside and sit  
24 on the bench out there.

25 MR. KROG: The only other witness we

1 have other than the two Messrs. Berge is Ms. Paula  
2 (inaudible) who is (inaudible).

3 MR. LEFKOVITZ: Mr. Warlick was on your  
4 witness list, did he get excused?

5 MR. KROG: Mr. Warlick has been excused.

6 MR. LEFKOVITZ: All right, thank you.

7 MR. KROG: Your Honor, the Plaintiff  
8 calls Mr. David Berge.

9 (Witness sworn)

10 CLERK: State your name for the record,  
11 please.

12 THE WITNESS: David Peter Berge.

13 MR. LEFKOVITZ: As a preliminary matter,  
14 Your Honor, right before the commencement of this case -

15 THE COURT: Speak into the microphone.

16 MR. LEFKOVITZ: I'm sorry, Your Honor, I  
17 thought this one was picking me up.

18 Your Honor, Steve Lefkovitz for the  
19 Defendant. Right before the commencement of this case - I  
20 just want to call it to the Court's attention - I saw Mr.  
21 Berge taking a pill. I asked him a few minutes ago what that  
22 pill was for and he said it was an anti-anxiety pill. But I  
23 did want the Court to be aware that he did take medication  
24 before he was offering testimony today, in case the Court of  
25 Appeals - and maybe he could explain what the medicine was.



1 I just noticed it and I wanted to call it to the Court's  
2 attention.

3 THE COURT: Mr. Berge, what pill did you  
4 take?

5 THE WITNESS: Xanax.

6 THE COURT: And are you sure that you can  
7 give full and fair testimony today, even with the Xanax  
8 onboard?

9 THE WITNESS: Yes.

10 THE COURT: I had a Xanax when I had an  
11 MRI because I'm claustrophobic and it put me to sleep. So,  
12 do you take Xanax regularly?

13 THE WITNESS: Yes.

14 MR. LEFKOVITZ: What was the milligrams  
15 of that Xanax, Mr. Berge?

16 THE WITNESS: One milligram.

17 THE COURT: And you don't think that's  
18 going to impair any of your answers today?

19 THE WITNESS: No.

20 THE COURT: Go ahead.

21 THEREUPON came

22 D A V I D P E T E R B E R G E

23 who, having been first duly sworn according to law, testified  
24 as follows:

25 DIRECT EXAMINATION

1 BY MR. KROG:

2 Q Where do you live, Mr. Berge?

3 A I currently have moved back into my  
4 parents' house, 135 Lawler Road (phonetic) in Hernando,  
5 Mississippi.

6 Q You're a college graduate, aren't you,  
7 Mr. Berge?

8 A Yes.

9 Q Rhodes College?

10 A Yes.

11 Q What year did you graduate?

12 A 2001.

13 Q Your father operated between 1997 and  
14 2012 a business under the name of MarketGraphics of Memphis,  
15 did he not?

16 A Yes.

17 Q And to clarify, your father is Mr. Donald  
18 Berge?

19 A Yes.

20 Q And you worked with your father's  
21 MarketGraphics of Memphis business from its inception in  
22 1997, correct?

23 A Yes, off and on, over the course of 15  
24 years.

25 Q Your father operated that

1 business pursuant to a license or associate agreement with  
2 MarketGraphics of Memphis, correct?

3 A I believe it was called an associate  
4 agreement.

5 Q And my question was - let me restate the  
6 question. Your father operated MarketGraphics of Memphis  
7 pursuant to an associate agreement with MarketGraphics  
8 Research Group or MarketGraphics National, correct?

9 A Yes.

10 Q And that was a housing market research  
11 business, correct?

12 A Correct.

13 Q You and your father collected housing  
14 market data and delivered it to MarketGraphics here in  
15 Nashville and MarketGraphics produced a report based on the  
16 data, correct?

17 A Correct.

18 Q You did what they call drive the market  
19 for MarketGraphics of Memphis, correct?

20 A Yes; my father and me, and sometimes when  
21 I was in college I didn't do it, and there were other  
22 occasions within the 15 years where I had another job that  
23 kept me from doing the drive.

24 Q With the exception of a few odd cycles  
25 where you weren't able to participate, you participated

1 in driving the market during this period, correct?

2 A Correct.

3 THE COURT: What does it mean by driving  
4 the market? I don't understand that. Are you going to ask  
5 that?

6 MR. KROG: I can ask it or he can answer  
7 the question from Your Honor.

8 THE COURT: Yes, answer it.

9 THE WITNESS: Well, to drive the market,  
10 we go through every fourth month and go through all of the  
11 active subdivisions and the active subdivisions in our  
12 database. We count the starts and closings, and based on  
13 those starts and closings, it's entered into a database that  
14 formulates a report, and bankers can utilize that report to  
15 decide whether or not a subdivision is a good investment.  
16 Like if a builder comes to X Bank and says I want a  
17 construction lot on three lots in a subdivision, they will  
18 turn around a look at the data to decide whether or not that  
19 construction loan is a good idea. So, we basically, every  
20 four months just refresh the data and based on the previous  
21 data you can tell the growth, what areas are growing and what  
22 subdivisions are successful, what subdivisions have been  
23 overbuilt and things like that.

24 THE COURT: Let me ask Mr. Lefkovitz a  
25 question. Mr. Lefkovitz, you've been around your



1 client quite a bit; is that right?

2 MR. LEFKOVITZ: Yes, Your Honor.

3 THE COURT: Does he sound like he's  
4 playing with a full deck today?

5 MR. LEFKOVITZ: Yes, Your Honor. I think  
6 he's doing fine.

7 THE COURT: I don't know, I've never  
8 heard him before. He sounded kind of sleepy to me. But go  
9 ahead.

10 THE WITNESS: I am sleepy. I got about  
11 four hours.

12 THE COURT: That's not a problem.

13 MR. LEFKOVITZ: If I were walking into a  
14 trial, I would be up all night before.

15 BY MR. KROG:

16 Q And to clarify, Mr. Berge, counting the  
17 starts and the progress on these audits that you drove the  
18 market, those would be construction of new homes, how many  
19 new homes had been started, what the progress was on those  
20 new homes and subdivisions?

21 A Yes.

22 Q And you did that in Shelby County and the  
23 surrounding counties in Memphis?

24 A It was mainly just DeSoto County and  
25 Shelby County, so two out of five counties.



1                   Q     If you would please look behind you, Mr.  
2 Berge, there is a box of binders and I believe one of those  
3 binders should have a little sticky note with the No. 2 on  
4 it. I'll ask you to turn to Tab 30 in that binder, Mr.  
5 Berge.

6                   A     MG 18?

7                   Q     Yes. And Mr. Berge, when you drove the  
8 market as we've been talking about, you used 11 x 17 MG area  
9 maps to do that, didn't you?

10                  A     Yes.

11                  Q     You carried these in the car with you?

12                  A     Yes.

13                  Q     And the map we're looking at here, MG 18,  
14 that is essentially identical to the map you would have used  
15 to drive that market in a given year, correct?

16                  A     That's correct. The things that would  
17 change would be subdivisions dropping off or being added.  
18 But, other than that, the boundaries are the same.

19                  Q     And the subdivisions are marked on this  
20 map with little (inaudible) rectangles, aren't they?

21                  A     Yes.

22                  Q     Now, if you would look further in Tab 30,  
23 you will see there are the maps for the other DeSoto County  
24 and Shelby County MGA is on there; is that Shelby County and  
25 DeSoto County?

1 A Right, yes.

2 Q When you drove the market in 2007, you  
3 use these maps in the car, correct?

4 A That's correct.

5 Q How long, Mr. Berge, did you spend in a  
6 car each day with these maps when you were driving the  
7 market?

8 A It varied. As we got closer to the data  
9 that needed to be done, sometimes I would crunch and I would,  
10 you know, do 12+ hours, but I typically like to keep it to  
11 about 8 to 10 hours. After while it started to drain on me  
12 and I'd get headaches and stuff like that.

13 Q And how long did it take you to complete  
14 the audit for a given report cycle?

15 A Approximately three weeks.

16 Q Now, Mr. Berge, if you'll turn to Tab 31  
17 in the binder, Exhibit 31, these are the same maps for 2008,  
18 aren't they?

19 A (Pause).

20 Q The tabs are sort of buried in between  
21 the maps because the maps are longer than the tab pages.

22 A I'm not seeing these tabs.

23 MR. KROG: May I approach, Your Honor?

24 THE COURT: You may.

25 BY MR. KROG:

1                   Q     Mr. Berge, the question was whether these  
2 2008 maps are the same maps you would have used when you  
3 drove the market in 2008?

4                   A     Yes. The boundaries of the area are the  
5 same but, once again, over time subdivisions get added and  
6 they get dropped. They get dropped after they're completed,  
7 meaning the last house that's been built finally has an  
8 occupant, then we take it off the database.

9                   Q     I'm not asking you about the locations of  
10 the subdivisions so -

11                  A     Do you want the boundaries?

12                  Q     The fact that you used these 11 x 17 maps  
13 to drive each time you drove in 2008.

14                  A     That's correct.

15                  Q     And you believe them to be the recent  
16 maps because otherwise, as you noted, the subdivisions would  
17 be in the wrong place, right?

18                  A     Can you repeat that?

19                  Q     Sure. When you drove the market you  
20 needed to use the map that had come out most recently  
21 because, otherwise, the subdivisions would not be in the  
22 correct places on the map?

23                  A     Usually that's correct but as the market  
24 slowed there weren't many subdivisions being added or deleted  
25 so sometimes I would use the same map that had been out from

1 the first report all the way through the end of the year.

2 So, we'd use the same map for three months, the three audit  
3 periods.

4 Q The witness completely passed Exhibit 32.

5 A (Inaudible).

6 Q I just have the same question about  
7 Exhibit 32. Is Exhibit 32 a collection of the maps you used  
8 to drive the market in 2009?

9 A Yes, it's the same answer as I gave  
10 before.

11 MR. KROG: Could the witness please be  
12 passed Exhibit 33?

13 BY MR. KROG:

14 Q And I just have the same questions, Mr.  
15 Berge, about this exhibit, a compilation of maps that you  
16 used to drive in 2010.

17 A Same answer.

18 Q And if Exhibits 34 and 35 are the same  
19 maps from the years 2011 and 2012, your answer would be the  
20 same, correct?

21 A Correct.

22 MR. KROG: And could the witness be  
23 passed Exhibits 34 and 35?

24 BY MR. KROG:

25 Q And those are respectively the



1 11 x 17 maps you used in those years?

2 A That's correct.

3 Q You know what a copyright is, don't you,  
4 Mr. Berge?

5 A I don't know technically but I've got a  
6 good idea.

7 Q Well, you know, Mr. Berge, that copyright  
8 means that the thing being copyrighted is somebody's  
9 intellectual property, correct?

10 A Correct.

11 Q And you know that the law prohibits  
12 people from copying other people's copyrighted things,  
13 correct?

14 A Correct.

15 Q You knew that back when you were driving  
16 the market for MarketGraphics in Memphis, correct?

17 A Well, it's kind of confusing because I  
18 knew my dad created the initial boundaries in '88 and he was  
19 working as MarketGraphics of Memphis. So, there's a little  
20 bit of confusion when it came to -

21 Q I didn't ask you about what happened in  
22 1988 or who created the boundaries, did I?

23 A I guess not. If you could repeat the  
24 question.

25 Q Mr. Berge, you knew between 2007 and



1 2012 that it was unlawful to copy somebody else's copyrighted  
2 material, correct?

3 A Right. I had nothing to do with the  
4 creation of those maps.

5 Q Mr. Berge, each one of these maps we've  
6 looked at has the copyright legend in the lower right-hand  
7 corner, doesn't it?

8 A Yeah, at the very bottom, MarketGraphics  
9 Research Group, Incorporated, 2009.

10 Q And the ones we saw for 2007, 2008, 2010,  
11 2011 and 2012 have the corresponding legend, didn't they, Mr.  
12 Berge?

13 A Yes, I'm assuming so.

14 Q Feel free to go back through them and  
15 look at them one-by-one.

16 A Yes.

17 Q The record will reflect that they were  
18 there.

19 A Okay.

20 Q And these are the maps, Mr. Berge, that  
21 you spent eight to 12 hours with in a car for three weeks at  
22 a time, three times a year for these years, correct?

23 A For a total of nine weeks a year,  
24 correct.

25 Q And you looked at these maps while

1 you were driving?

2 A Yes, I did.

3 Q And of all that time you saw on one of  
4 these maps, if not every last one, this copyright legend,  
5 didn't you, Mr. Berge?

6 A You know, to be honest, I never really  
7 paid attention to it. I never really thought about it  
8 because, like I said, my father created boundaries. We were  
9 collecting the data. He was working under the name of  
10 MarketGraphics in Memphis. I just really wasn't that  
11 observant, to be honest.

12 Q Mr. Berge, again, I think you're  
13 answering a slightly different question. You can't sit here  
14 and tell the Court that at no time between 2007 and 2012 did  
15 you see the legend on these maps, "Copyright MarketGraphics  
16 Research Group, Inc," can you?

17 A Not for certain, no.

18 Q In fact, you would say it's more likely  
19 than not that you did see that legend, at least some of the  
20 time.

21 A Possibly.

22 Q It's more than possible, isn't it, Mr.  
23 Berge, you looked at the maps eight to 12 hours a day for  
24 nine weeks out of the year -

25 A I didn't focus on the lower right

1 corner, I was focused on the map of the subdivision.

2 Q Mr. Berge, you knew in August or  
3 September 2012 that your father was going to quit working  
4 with MarketGraphics Research Group and do essentially the  
5 same business under the name Realysis of Memphis, correct?

6 A Yes.

7 Q In fact, you had already (inaudible) on  
8 the market for Realysis of Memphis before your father  
9 requested to terminate his associate agreement with  
10 MarketGraphics, hadn't you?

11 A That's correct. There was an overlap but  
12 it wasn't for a report, it was for a thumb drive and he  
13 didn't charge for it. He just gave it in addition to for the  
14 MarketGraphics clients.

15 Q Well, Mr. Berge, that's not entirely  
16 accurate, is it?

17 A I don't know what you mean.

18 Q If you would turn behind you and get the  
19 binder that is marked one. I apologize for sitting that one  
20 on the ledge there. Hope you don't knock it off. And if  
21 you'll turn to Tab 9 and flip to - if you'll look at the  
22 corner of these documents, they have page I.D. numbers.  
23 Please flip to Page I. D. Number 437.

24 Mr. Berge, I apologize, I'm having you  
25 look at the wrong exhibit. If you'll please turn to

1 Page I.D. 449.

2 A Invoice?

3 Q Yes. This invoice is dated September 24,  
4 2012, isn't it, Mr. Berge, right under the word "invoice"?

5 A That's correct.

6 Q And this invoice is for the quarters that  
7 are included with the Q2 printed report, correct?

8 A Our second report coming out, is that  
9 what you mean?

10 Q Well, I just asked you if it says Q2  
11 2012. And if you look in the binder behind you again, I  
12 believe you will find the Q2 2012 Realysis report.

13 A In the binder right here?

14 Q In the box.

15 A What did you want me to look for?

16 Q The Realysis binder. That binder is  
17 marked Exhibit 52, is it not?

18 A Yes.

19 Q And the invoice, looking at the screen,  
20 is marked Page I.D. 449 and we have Exhibit 9. This one is  
21 the invoice for the binder that is in Exhibit 52, correct?

22 A Yes.

23 Q And the invoice came out after the binder  
24 did, correct?

25 A That's correct.



1 THE COURT: The binder what?

2 MR. KROG: Exhibit 52, Your Honor.

3 THE COURT: Thank you.

4 BY MR. KROG:

5 Q And your father didn't email  
6 MarketGraphics Research Group to ask to terminate the  
7 associate agreement until four days after this invoice was  
8 printed, did he, Mr. Berge?

9 A Would you repeat the question?

10 Q Sure. Your father didn't email  
11 MarketGraphics Research Group to request termination of the  
12 associate agreement until four days after this invoice was  
13 printed, did he?

14 A I don't know when he sent that, did the  
15 termination letter. I had nothing to do with the operation  
16 of the business so I don't know.

17 Q If you would look at Exhibit 39, Mr.  
18 Berge, which should be in the two binder.

19 A I'm sorry, two binder what?

20 Q Tab 39.

21 A I've got it.

22 Q And that email from September 28, 2012  
23 your father sent requesting to terminate the associate  
24 agreement, isn't it?

25 A It appears to be so, yes.



1 Q So this email actually came out before  
2 your father told MarketGraphics that he wanted to terminate  
3 their relationship, didn't it?

4 A Did it appear so, yes.

5 Q So you actually did drive the market for  
6 a printed Realysis book before your father requested to  
7 terminate MarketGraphics of Memphis, didn't you?

8 A Apparently so, but I didn't realize that  
9 at the time.

10 Q Well, that's not true, is it, Mr. Berge,  
11 because of the areas were different, weren't they?

12 A Yeah, but I didn't know when he sent the  
13 termination letter. I didn't have anything to do with the  
14 creation of that.

15 Q You knew you were using different maps to  
16 drive the market, didn't you, Mr. Berge?

17 A The Realysis maps, correct.

18 Q And some of those areas in Memphis are  
19 different than MarketGraphics areas, aren't they?

20 A Yes, because, as a city grows and they  
21 annex, boundaries change and boundaries are modified. He  
22 took steps to update the boundaries.

23 Q And you didn't think when you were  
24 driving with Realysis maps that you were driving with the  
25 MarketGraphics maps, did you?

1 A No.

2 Q We just looked at that September 28, 2012  
3 email and your father actually told you he was going to send  
4 that, didn't he, before he did it?

5 A No, no, he didn't tell me when he was  
6 going to send it or what. I didn't know what had occurred.  
7 I knew he had plans to terminate but I had never read this  
8 letter or knew when he sent it.

9 Q Mr. Berge, I didn't ask you if you had  
10 read the email, did I?

11 A No, you didn't.

12 Q I asked if you knew your father was going  
13 to terminate, which you did know that -

14 A You asked me if I knew that he was going  
15 to send this letter and the answer to that is no, I did not.

16 Q You didn't know that your father was  
17 going to send that specific email.

18 A Right.

19 Q But you knew your father was going to  
20 contact MarketGraphics and terminate his associate agreement,  
21 request to terminate it, and that he was going to continue  
22 doing Market Research business under this name Reanalysis of  
23 Memphis.

24 A Yeah, I would hear about this stuff after  
25 the fact, after he would do stuff. I mean I didn't live in

1 Memphis, I lived in Nashville. I mean we didn't have daily  
2 conversations about this time. Sometimes it would be weekly  
3 and sometimes not even that. I mean the audit took me three  
4 weeks, and as soon as I was done, I had to drive back to  
5 Nashville to do construction audit inspections the first week  
6 of every month. And our discussion of Realysis and  
7 MarketGraphics was very, very limited. So, it's not like I  
8 was in Memphis working with him on a daily basis, I wasn't.  
9 I was an independent contractor and I only worked nine weeks  
10 and this wasn't my baby. I'd been -

11 Q Mr. Berge, your father told you before he  
12 sent that letter that he was going to terminate, didn't he?

13 A Yes.

14 Q He told you at least far enough in  
15 advance for you to drive the market with the Realysis maps,  
16 didn't he?

17 A I don't recall when he told me. I didn't  
18 ask questions.

19 Q And you continued to work with your  
20 father's market research business after he switched over to  
21 being Realysis of Memphis, correct?

22 A That's correct. It was still three weeks  
23 at a time, three times a year up to a quarterly. So an  
24 additional fourth.

25 Q You did more than just drive the

1 market for Realysis Memphis, didn't you, Mr. Berge?

2 A That was the bulk of it. I also went to  
3 public websites where plat approvals were recorded so that we  
4 could figure out if there were any new subdivisions on the  
5 horizon.

6 Q That was called pipeline research?

7 A Well, pipeline was actually one step even  
8 farther back. That's when tracts of lands are rezoned to  
9 residential and that gets put in the database as well.

10 Q And you did pipeline research for  
11 Realysis, didn't you?

12 A I did part of it. I did the research for  
13 two out of the five counties.

14 Q And you helped hold the MLS data for the  
15 price information that was put into the (inaudible), correct?

16 A That's correct.

17 Q And you did between 90 and 100 percent of  
18 the data entry for Realysis, didn't you? You went out and  
19 drove and then you typed it all into the computer so it could  
20 go into the book?

21 A Well, starting off like when I was in  
22 college and stuff like that.

23 Q Mr. Berge, I didn't ask you about what  
24 you did in college, I asked you what you did for Realysis.

25 A Oh, for Realysis. Yeah, I probably



1 did 90 percent. My dad would help me sometimes if we were  
2 behind schedule or something.

3 Q And there was one occasion you generated  
4 the Reanalysis Memphis invoices, didn't you?

5 A Yes.

6 Q You even had a desk at your parents'  
7 house that was your desk where you did these things, didn't  
8 you?

9 A That's correct. I didn't have  
10 MarketGraphics or Reanalysis material at my Nashville house.  
11 All the materials were kept with my father.

12 Q So you came and you had your desk there  
13 and you did the research and you drove the market and you  
14 came home and you put it into the computer, and then you went  
15 back home?

16 A Yes, sir.

17 Q If you'll look back at Exhibit 52, Mr.  
18 Berge -

19 THE COURT: Let's take a three-minute  
20 break.

21 MR. KROG: Yes, Your Honor.

22 (Brief recess)

23 CLERK: All rise.

24 THE COURT: Be seated, please.

25 BY MR. KROG:

1 Q Going back to Exhibit 52, Mr. Berge,  
2 that's the Realysis Q2 report, there's not much in here, Mr.  
3 Berge, other than the data you collected, is there, apart  
4 from some introductory letter material?

5 A You mean the bar graphs and stuff like  
6 that?

7 Q Well, the bar graphs and the tables, all  
8 they did was present the data you collected in the last  
9 pipeline research and out on the drive, correct?

10 A Yes, a portion. Like I said, I did two  
11 out of the five counties; my dad did the three others.

12 Q And the maps depict the locations of  
13 subdivisions, correct?

14 A Correct.

15 Q And you input the GPS coordinants for the  
16 subdivision so they can plot it on the map, correct?

17 A That's correct. My father and I both did  
18 that.

19 Q Realysis of Memphis, Mr. Berge, was an  
20 LLC in the State of Tennessee, wasn't it?

21 A Yes.

22 Q And you were the sole member and officer  
23 of Realysis of Memphis, LLC, weren't you?

24 A Yes. I found out that after the fact, my  
25 father set me up as a registered agent. I didn't know about

1 that and I guess he appointed me sole member and I didn't  
2 find out about that until after the fact as well.

3 Q You didn't object when you found out  
4 about it, did you?

5 A Well, it was after the fact.

6 Q In fact, when you filed your Bankruptcy  
7 Petition, Mr. Berge, with this court, you actually listed  
8 that you were doing business as Reanalysis of Memphis, didn't  
9 you?

10 A Yes. I can't remember who was helping me  
11 with that when I filled out my Bankruptcy. Someone must have  
12 told me to do that.

13 Q And this Reanalysis Report that we looked  
14 at in Exhibit 52 wasn't the only report, the only addition to  
15 this report that Reanalysis of Memphis put out, was it?

16 A No.

17 Q In fact, Reanalysis put out several more,  
18 even after MarketGraphics had filed suit against them in  
19 January of 2013, didn't it?

20 A Yes, up until the preliminary injunction.

21 Q And if you look at Exhibit 67, Mr. Berge

22 -

23 A Is that in Binder 2 or -

24 Q That should be in Binder 2.

25 A Sixty-seven?

1                   Q     Yes, Mr. Berge. Those are excerpts,  
2 aren't they, Mr. Berge, from the Q3 2012 Realysis of Memphis  
3 Report, aren't they?

4                   A     Right.

5                   Q     And they would have been part of a book  
6 just like the Q2 that's marked with Exhibit 52?

7                   A     Yes.

8                   Q     And if we look at Exhibit 69, that's the  
9 Q4 2012 report or excerpts from it, correct?

10                  A     That's correct.

11                  Q     And it also came out in binder form like  
12 Q2?

13                  A     Yes.

14                  Q     And these reports that Realysis put out,  
15 they were similar to the reports that MarketGraphics put out,  
16 weren't they?

17                  A     Yes.

18                  Q     You knew that clients in this area  
19 weren't likely to get the Realysis Report and MarketGraphics  
20 Report, didn't you, Mr. Berge?

21                  A     Well, I said they are similar but it  
22 should be noted that I never read the MarketGraphics Reports  
23 and honestly I've never read the Realysis Reports. The only  
24 reason I would reach into these reports was to actually get  
25 the maps. But based on the preliminary injunction that



1 I witnessed, I would assume, yes, they are similar.

2 Q Well, your attorney actually admitted  
3 during that hearing that they were similar, didn't he?

4 A Yes.

5 Q And you knew what was in the  
6 MarketGraphics Report, even if you didn't look at it, didn't  
7 you, Mr. Berge? You were out there driving -

8 A You don't know exactly what's in a report  
9 if you don't look at it.

10 Q You collected a large portion of the data  
11 that went into the report, didn't you, Mr. Berge?

12 A Right.

13 Q When you were working for Reanalysis of  
14 Memphis, you were paid by the report cycle, correct?

15 A That's correct.

16 Q You were paid between \$6000 and \$10,000 a  
17 report cycle?

18 A Yes. It varied between that. Well,  
19 actually, I didn't receive compensation but once I was out on  
20 my own, yes, I got paid between six and \$10,000.

21 Q And that was the same that Reanalysis of  
22 Memphis paid, correct?

23 A That's correct.

24 Q And where within that range your  
25 compensation fell depended upon how many clients the

1 business had, didn't it?

2 A Yeah. My father and I didn't have a set  
3 contract or anything. We never discussed the money, we never  
4 argued over it. He decided what he wanted to pay me and that  
5 was it.

6 Q But the better the business was doing,  
7 the more you got paid, right?

8 A Yes. I would assume so.

9 Q Well, it makes sense, doesn't it?

10 A Yes.

11 Q More likely -

12 A I just didn't have access to his  
13 financials so I - actually, most of the time I didn't even  
14 know how many clients he had. But, yes, that's a safe  
15 assumption.

16 Q More likely than not?

17 A Sure.

18 Q And your father would tell you when  
19 things were going poorly, wouldn't he?

20 A Poorly? He actually held off on that for  
21 quite a bit. It kind of took me by surprise because, you  
22 know, the market took a dip around 2008 and he had been  
23 struggling, losing clients for a while before he told me. I  
24 was surprised because he didn't really curtail my payments,  
25 so when he finally told me that his business wasn't doing

1 that well and he was, you know, had only been breaking even  
2 for a couple years, it actually came as a surprise to me.

3 Q But as Reanalysis of Memphis, the better  
4 that business did the more you would get paid, right?

5 A Yes.

6 Q And you mentioned this before but just to  
7 recapitulate, MarketGraphics puts out three reports a year,  
8 correct? And so you got paid three times a year?

9 A That's correct.

10 Q The \$6000 to \$10,000 range?

11 A Yes.

12 Q Your father, for Reanalysis of Memphis, was  
13 doing four reports a year, correct, came out quarterly?

14 A That's right.

15 Q And you were still paid by the report  
16 cycle?

17 A I don't know if the payment went down for  
18 doing the fourth one or not. He couldn't afford to pay me in  
19 bulk so he would just pay me as - first, he would give the  
20 report to the clients and then he had to wait on the  
21 invoices. So, he couldn't pay me right after I had done the  
22 update. It was spread out and he kept track of it. I didn't  
23 really -

24 Q Well, Mr. Berge, you testified during  
25 your deposition that you were paid - I asked, "How much did

1 you get paid by MarketGraphics Memphis?" You said,  
2 "MarketGraphics of Memphis varied. I mean you're talking 15  
3 years and depending on my parents' financial situation, how  
4 the market was doing -

5 THE COURT: You need to speak into the  
6 microphone or I'm afraid we're not going to get a good  
7 record.

8 MR. KROG: I apologize, Your Honor. That  
9 makes perfect sense.

10 BY MR. KROG:

11 Q And you said it varied between \$6000 and  
12 \$10,000 in the update period. And then you say, "It depended  
13 on how the market was doing." "Which market are we talking  
14 about?" "Talking about the Memphis market and how many  
15 clients he had, how successful he was." Question: "How did  
16 you get paid by Realysis of Memphis?" Answer: "It didn't  
17 change. It was still based on me coming to do those  
18 updates." Question: "And what determined how much money you  
19 actually got from Realysis of Memphis?" Answer: "Same deal.  
20 What he could afford, how many clients he had. If he had  
21 lost some it still varied within that six to 10 range."

22 Q You knew - that was truthful testimony  
23 when you gave it, wasn't it, Mr. Berge?

24 A Yes.

25 Q You knew in the fall of 2012 that you



1 and your father didn't have MarketGraphics' permission to  
2 operate a different market research business, didn't you?

3 A Yes. I was aware of the non-compete;  
4 however, I never read it or signed it but I was aware of a  
5 non-compete that my father kept telling me was invalid  
6 because there was no time limit on there and that there was  
7 no configuration. So I kind of disregarded it. I mean I  
8 trusted what my father said and I can only make decisions  
9 based on the information I'm getting.

10 Q Mr. Berge, you could have gone out and  
11 done your own investigation, couldn't you have?

12 A Yes, I guess.

13 Q You could have asked him to give you a  
14 copy of the associate agreement, couldn't you have?

15 A I could have.

16 Q And you never did?

17 A That's correct.

18 Q And you never asked any attorney that you  
19 consulted prior to the fall of 2012 whether your father's  
20 non-compete was enforceable, did you?

21 A No, I did not.

22 Q You didn't ask in the fall or winter of  
23 2012 when you were starting Reanalysis of Memphis, you didn't  
24 ask any attorney, "Please look at this non-compete and tell  
25 me whether or not it's enforceable. Here's a description

1 of what we're doing."

2 A Right, I didn't ask that.

3 Q In fact, you knew in September of 2012 or  
4 the first days of October of that year that you were likely  
5 to get sued by MarketGraphics for what you were doing, didn't  
6 you?

7 A I knew that might be a possibility.

8 Q And it was in that context of receiving  
9 what you thought was a threatening letter from Mr. Edsel  
10 Charles that your father told you that you didn't have  
11 anything to worry about if you didn't sign the agreement,  
12 right?

13 A Right. He, basically, said, you know,  
14 I've talked to attorneys; it's vague; there's no term limit;  
15 there's no consideration; you have nothing to worry about.  
16 On my side maybe I was naïve. I didn't think I was doing  
17 anything wrong because I'd never signed the agreement so I  
18 didn't know.

19 Q Have you reviewed the deposition that  
20 your father gave in December of last year in your case  
21 against Mr. Warlick?

22 A Yes, it was on video. Is that the one  
23 you're talking about?

24 Q No. Are you referring to the deposition  
25 that was taken at my firm's office in May of 2015?

1 A Yes.

2 Q You watched the video of that deposition?

3 A Yes.

4 Q You're aware that you and your father  
5 have filed a lawsuit against the attorney who represented you  
6 in the case by MarketGraphics, correct?

7 A Yes.

8 Q You're aware that your father was deposed  
9 in that case in December?

10 A Oh, yeah, back in Memphis, yes.

11 Q And you were told that the attorney for  
12 Mr. Warlick asked your father, told him that the non-compete  
13 was unenforceable?

14 A No, I didn't read that deposition nor did  
15 I see it or discuss it with my father.

16 Q Did you ever ask your father exactly who  
17 told him that?

18 A No.

19 Q Do you agree that people should follow  
20 the agreements they sign, don't you, Mr. Berge?

21 A Sure.

22 Q And if you sign a contract saying one  
23 thing and then you do something else, that's dishonest?

24 A Yes.

25 Q Your father didn't follow the

1 agreement he had with MarketGraphics, did he?

2 A No.

3 Q And you knew in October of 2012 that what  
4 he was doing was breaking that agreement, didn't you?

5 A Well, like I said before, I dismissed it  
6 because the information I was getting was that it wasn't  
7 valid and it wouldn't hold up in court. So, at the time, no,  
8 I didn't know that he was technically doing anything wrong.

9 Q Mr. Berge, you'll agree, won't you, that  
10 there's a difference between doing something you've agreed  
11 not to do and doing something for which you can be punished?

12 MR. LEFKOVITZ: Your Honor, I think  
13 that's been asked and answered.

14 THE COURT: He's talking about a contract  
15 violation by his father. I don't see where this is getting  
16 you anywhere on malice.

17 BY MR. KROG:

18 Q One of the reasons that you and your  
19 father thought that everything would be hunky-dory, so to  
20 speak, with Realysis of Memphis, was that everything for  
21 Realysis of Memphis was going to be done in your name, isn't  
22 it, Mr. Berge?

23 A No, I didn't have these conversations  
24 with my father. Like I said, the transition from  
25 MarketGraphics to Realysis was very limited between me and my



1 father. I lived nine months in Nashville. I didn't care to  
2 talk about it with him and I told him, you know, if this is  
3 the move you're going to make that's, fine but - I'll help  
4 you do the market updates but other than that I really don't  
5 want to be a part of it.

6 Q Well, you knew you were a bigger part of  
7 it than that, didn't you, Mr. Berge?

8 A I mean doing updates nine weeks out of  
9 the year, I don't consider that to be a big part of the  
10 business. I mean -

11 Q Well, Mr. Berge, you knew that your role  
12 in the business was more than that, didn't you?

13 A Yes. But if I didn't it he could have  
14 gotten somebody else to do the updates. It's not rocket  
15 science. It's just driving through subdivisions and counting  
16 houses.

17 Q But your father didn't get someone else  
18 to do it, did he?

19 A Yes, he did, on multiple occasions.

20 Q He didn't get somebody else instead of  
21 you?

22 A If I couldn't do it, yeah, he did.

23 Q During the Realysis of Memphis period -

24 A Not during the Realysis period, no.

25 Q Nobody else helped your father with

1 the Reanalysis of Memphis business, did they?

2 A Well, I mean the computer guy helped a  
3 whole lot. He created the software.

4 Q No one else did the things that you were  
5 doing?

6 A Right. My father was doing - it was just  
7 me and my father, correct.

8 Q And your father told you before the  
9 lawsuit that you didn't have to worry about the non-compete,  
10 didn't he, Mr. Berge?

11 A Yeah, I was told that by him multiple  
12 times.

13 Q The only attorney who told you that, Mr.  
14 Berge, was Mr. Warlick, after the lawsuit was filed, wasn't  
15 it?

16 A Well, Jack Turner, he got Jack Turner's  
17 advice but I didn't get that directly from him. It was  
18 hearsay through my father.

19 Q Didn't you tell us, Mr. Berge, that you  
20 didn't ask any attorneys whether or not what you all were  
21 going to be doing would breach the non-compete?

22 A Say that again.

23 Q Didn't you tell us, Mr. Berge, that you  
24 didn't ask any attorney whether what you were doing was  
25 permissible?

1                   A     That's correct. All the information I  
2 got was through my father.

3                   Q     And if you hadn't been involved at all in  
4 your father's Realysis business or in the Realysis business,  
5 you - there wouldn't have been a reason for you to worry or  
6 not worry, would there have been?

7                   A     Would you repeat that?

8                   Q     You don't care one way or another whether  
9 your mother has a non-compete provision in her agreement with  
10 the school system, do you?

11                  A     No.

12                  Q     Your mother is a teacher?

13                  A     Right.

14                  Q     But you don't have anything at all to do  
15 with your mother's employment, do you?

16                  A     No.

17                  Q     So it wouldn't make any sense to you to  
18 have a discussion about whether or not you had to worry about  
19 the terms of her agreement, would it?

20                  A     That's correct.

21                  Q     Now, the Realysis of Memphis bank account  
22 was actually under your name, wasn't it, Mr. Berge? It was  
23 part of your accounts at First Tennessee?

24                  A     Well, I found out after the deposition,  
25 actually, that when I accessed my checking accounts at

1 Tennessee it used the same password and you could see my  
2 father's checking accounts as well. And there was one that  
3 said Realysis.com, and I just assumed that was the Realysis  
4 account. Come to find out, after asking my father about it,  
5 the Realysis account that he used was at Bank Plus, which I  
6 had no access to.

7 Q Well, it's true, isn't it, Mr. Berge,  
8 there was a Realysis of Memphis bank account that was under  
9 your password at First Tennessee, wasn't it, and you knew  
10 that at the time of your deposition, didn't you, because you  
11 told us about it?

12 A That's correct.

13 Q "Did you ever have the password for  
14 Realysis of Memphis's online banking interface?" Answer: "I  
15 did because my two checking accounts were within the same  
16 password."

17 A Right, I said that. And like I just said  
18 before, I was mistaken on that. That wasn't the actual  
19 Realysis account that was getting the money from the clients.  
20 I didn't know that at the time. I never saw the money coming  
21 into Realysis. I had no idea how much it was or anything  
22 like that. I didn't deal with the operations.

23 Q Turn to Exhibit 53, please, Mr. Berge.

24 A In two?

25 Q Fifty-three is in two.



1                   A     I have 52 and 53 with a blank in between.

2                   Q     Is there nothing behind Tab 53 in your  
3 binder, Mr. Berge?

4                   A     Yeah, 53 is First Tennessee Bank  
5 transactions.

6                   Q     And this is the Reanalysis of Memphis Bank  
7 Account ledger that you produced in discovery in this case,  
8 isn't it, Mr. Berge?

9                   A     Yes. My dad produced it for me but -

10                  Q     Mr. Berge, this is the checking account  
11 that you can get to from your online banking password, isn't  
12 it?

13                  A     I believe so, yes.

14                  Q     And it's not the same as the Reanalysis.com  
15 bank account, is it, Mr. Berge?

16                  A     Apparently not. I only use my two  
17 personal accounts. I never open my father's accounts. I  
18 mean I wasn't going to go delving into his business.

19                  Q     Your name was on just about everything  
20 Reanalysis of Memphis put out as its Owner and President,  
21 wasn't it, Mr. Berge?

22                  A     Yes. I found that out through the facts,  
23 yes.

24                  Q     Well, you knew at the time that it was on  
25 the Reanalysis Memphis website, didn't you?

1 A I did.

2 Q And that it listed you as Owner and  
3 President?

4 A Owner I'm not sure but President, yes.  
5 It may have said I was owner as well; I didn't create the  
6 website.

7 Q Only that there was an address with your  
8 name being used to send emails from Realysis of Memphis?

9 A Yes, my dad created Don@Realysis,  
10 David@Realysis and Berge@Realysis. He did that without my  
11 knowledge and I didn't know how to access Realysis.com. I  
12 didn't have a password or anything.

13 Q You knew that they were being used to  
14 send emails that appeared to come from you, didn't you?

15 A I only knew about the verification letter  
16 that came out at the very beginning. I was not aware to the  
17 extent that he was using my name at the bottom.

18 Q You never asked him to stop doing that,  
19 did you, Mr. Berge?

20 A No, because I wasn't aware of it.

21 Q Well, Mr. Berge, you knew that he was  
22 doing it at least some, weren't you, Mr. Berge?

23 A Once I knew. And that was something I  
24 actually read.

25 Q You didn't inquire as to whether or

1 not he was doing it more often, did you?

2 A Like I said, I wasn't aware of it.

3 Q You didn't inquire as to whether he was  
4 doing it more often, did you, Mr. Berge?

5 A No, I did not.

6 Q You didn't say anything to the effect of,  
7 Dad, I'm not good with that idea.

8 A I wasn't aware that it was happening.

9 Q You were aware that the invoices that  
10 went out in your name, weren't you, Mr. Berge?

11 A Yes, I believe so.

12 Q You held yourself out as the President of  
13 Realysis Memphis, didn't you, Mr. Berge?

14 A I held myself out?

15 Q Yes.

16 A Yeah, on my Facebook page and Linked In.  
17 But it ended up just being a superficial title.

18 Q Well, if you look at Exhibit 68, Mr.  
19 Berge, that's your Linked In page as it appeared in early  
20 2013, isn't it?

21 A Yes.

22 MR. KROG: Your Honor, I would move  
23 Exhibit 68 into evidence.

24 MR. LEFKOVITZ: No objection.

25 THE COURT: It will be admitted.

1 (Exhibit 68 admitted)

2 BY MR. KROG:

3 Q And you will admit, Mr. Berge, that your  
4 father didn't create this Linked In page, did he?

5 A That's correct.

6 Q And you'll admit that Owner/President  
7 Realysis Memphis, LLC is a somewhat strange name for someone  
8 who's just an independent contractor, shows up every once in  
9 a while, does some grunt work to put on his Linked In page?

10 A Yes. The intention was that my father  
11 was going to phase himself out over the course of I don't  
12 know how long. That didn't really occur though because the  
13 preliminary injunction pretty much stopped it. So, yes, over  
14 the course of the years I probably would have taken up a more  
15 of a role but -

16 Q That was part of the plan here, wasn't  
17 it, Mr. Berge, that you would have - he would form Realysis  
18 of Memphis and you would work with him and that you would  
19 assume greater visibility and, as you said, take it over  
20 someday.

21 A Yes, that was his plan and that was his  
22 wishes. And he took steps to try and get me more involved.  
23 It just so happened I was hesitant to move into that role.

24 Q And you actually did increase your  
25 participation and visibility in the Realysis



1 Memphis business, didn't you, Mr. Berge?

2 A Yes, when the first report came out my  
3 father asked if I would come with him to hand-deliver I think  
4 it was about four or five to some bank clients that were  
5 close to his house in DeSoto. He asked if I would just come  
6 with him and do a meet and greet.

7 Q And you did that?

8 A Yes, for about four or five clients out  
9 of 20-something.

10 Q You knew who the other clients were, even  
11 the ones you didn't meet, didn't you, Mr. Berge?

12 A No.

13 Q You knew that your - you knew that the  
14 business provided research services to banks and appraisers  
15 and other similar people in the Memphis area, didn't you?

16 A I knew the average number of clients but  
17 I didn't know them on a personal level.

18 Q I didn't ask you if you knew the  
19 individual people, Mr. Berge, who worked for the client  
20 businesses, but you knew who the clients, in a corporate  
21 sense, were, didn't you?

22 A Like the bank name?

23 Q Yes.

24 A No.

25 Q Well, Mr. Berge, you did the invoices

1 at least once for the MarketGraphics of Memphis and Reanalysis  
2 of Memphis, didn't you?

3 A That's correct.

4 Q And you put the client names on there -

5 A I put the names on there, yes, but I  
6 didn't submit it to memory.

7 Q I didn't ask you if you'd submitted it to  
8 memory, Mr. Berge. And you admit, Mr. Berge, that when you  
9 were sued by MarketGraphics Research Group that you and your  
10 father defended that lawsuit largely on the basis that your  
11 father had retired and it was your business, didn't you?

12 A I had nothing to do with the defense. I  
13 never spoke to Warlick until meeting him approximately 30  
14 minutes before the preliminary injunction. Other than that,  
15 I've never spoken to him at all.

16 Q Did you not attend a meeting with your  
17 father and Mr. Warlick approximately 10 days before the  
18 preliminary injunction hearing?

19 A No, I did not.

20 Q Mr. Berge, I'm going to ask you to look  
21 at Exhibit 2.

22 A Are we still in Binder two?

23 Q Exhibit 2 is in Binder one. They go in  
24 order, one to 71. Exhibits 1 through 13 are in Binder one.

25 A Exhibit 2.

1                   Q     Mr. Berge, that's the entry you filed in  
2 the District Court case filed by MarketGraphics, isn't it?

3                   A     This is what my father did with Warlick.

4                   Q     Mr. Berge, this answer was filed on your  
5 behalf, wasn't it, by your attorney? Don't you see your  
6 name, Mr. Berge?

7                   A     I see my name on there. It was filed on  
8 my behalf but I didn't have anything to do with it.

9                   Q     If you'll turn, Mr. Berge -

10                  A     (Inaudible) Warlick should have tried  
11 them separately but I wasn't paying attention.

12                  Q     Mr. Berge, if we turn to Page 7 of this  
13 document.

14                  A     Page 7?

15                  Q     Yes. Paragraph 60.

16                  A     All right.

17                  Q     And do we see in Paragraph 60 that the  
18 answer that was filed on your behalf affirmatively states  
19 that the Realysis Reports produced by David Berge are very  
20 different from the MarketGraphics Reports?

21                  A     Uh-huh.

22                  Q     If we look at Exhibit 6, Mr. Berge - we  
23 look at Page 4 of Exhibit 6. Doesn't this response to a  
24 motion for summary injunction that was filed on your behalf  
25 in this case say that your father has retired -

1 A We're on Page 4?

2 Q Page 4 (Inaudible).

3 A Okay.

4 Q It says that your father has retired -

5 A Where is this?

6 Q I apologize. The last paragraph,  
7 beginning "In summary."

8 A Okay. Warlick sent this -

9 Q Back to the first page, Mr. Berge.

10 A Okay.

11 Q Do you see, "Defendant's Response To  
12 Motion For Preliminary Injunction," filed on your behalf?

13 A Uh-huh.

14 Q And then on Page 4 it says that your  
15 father has retired and that the remaining family members are  
16 operating the business independently of him.

17 A I see that, yes. Warlick and my father  
18 collaborated on this. I had nothing to do with this.

19 Q Well, Mr. Berge -

20 A I don't agree with (inaudible).

21 Q Would you look at Exhibit 27, actually  
22 before we switch binders, go to Exhibit 9, Mr. Berge. Page  
23 I.D. 376. Page 377, actually, please. And if we see on Line  
24 6 of this transcript of your father's deposition, you'll see  
25 that your father identifies you as the CEO, don't we?



1 A Uh-huh.

2 Q And you watched the video of this  
3 deposition after it was taken, didn't you, Mr. Berge?

4 A Yes.

5 Q Before the preliminary injunction?

6 A Yes.

7 Q And you never asked your father to  
8 correct the statements that he made in that deposition, did  
9 you? And, in fact, he makes similar statements multiple  
10 times in this deposition, doesn't he? And we could go  
11 through all of them.

12 A Yeah, it was on video. It was a couple  
13 hours long. I didn't take in all that information.

14 Q Well, none of it fazed you, Mr. Berge,  
15 did it, because you knew that this was the story that you  
16 were in charge, he had retired and that was how you were  
17 going to get away with this? That's what you knew to be the  
18 story, didn't you? I mean that's why you didn't react to it,  
19 isn't it, Mr. Berge? Because you knew that's what he was  
20 saying, what he was going to say?

21 A I don't recall this coming up and I just  
22 wasn't involved in this. I mean -

23 Q You never told Mr. Warlick to correct the  
24 statements that your father made, did you?

25 A No, I did not because I never spoke

1 to Warlick.

2 Q Well, you could have spoken to him,  
3 couldn't you have?

4 A Yeah, I could have picked up the phone  
5 but I mean -

6 Q You were at the preliminary injunction  
7 hearing, weren't you, Mr. Berge?

8 A Uh-huh.

9 Q And if we were to flip to Exhibit 10 and  
10 go to Page 1169, Line 24 -

11 A We're in Exhibit 10?

12 Q Exhibit 10. This is the transcript of  
13 the hearing we had on May 31. You were at this hearing,  
14 weren't you, Mr. Berge?

15 A Is this still within two? Oh, I'm on  
16 one.

17 Q This should be in Binder one, Mr. Berge.

18 A Exhibit 10 -

19 Q Look at the first page of that. This was  
20 the transcript from the May 31, 2013 hearing. You were at  
21 that hearing, weren't you, Mr. Berge?

22 A I'm not seeing what page you're wanting  
23 to refer me to.

24 Q If you will stop looking at the exhibit  
25 I'll just ask you a question. You were at this

1 hearing, weren't you, Mr. Berge?

2 A Which hearing was this?

3 Q May 31, 2013 in front of Judge Trauger  
4 across the street.

5 A The preliminary injunction?

6 Q Preliminary injunction hearing.

7 A Yes.

8 Q And while you were there you saw and  
9 heard Mr. Warlick say, and this is on Line 24, that David  
10 Berge is the one that runs that company, referring to  
11 Realysis of Memphis.

12 A Yeah, that's a false statement.

13 Q You never asked Mr. Warlick to correct  
14 that statement, did you?

15 A I'm not supposed to stand up in the  
16 middle of court.

17 Q There were times during that hearing when  
18 Mr. Warlick wasn't speaking and he was sitting at the table  
19 and you could have talked to him. You could have talked to  
20 him afterwards, and you did talk to him afterwards, didn't  
21 you?

22 A For a very short time.

23 Q And you didn't say, "Mr. Warlick, the  
24 things you said in that hearing aren't true, please correct  
25 them."

1 A No, I didn't say that.

2 Q And after the hearing your main  
3 impression wasn't, "Wow, my attorney and my father just lied  
4 to a federal judge," was it?

5 A No, I think my father was - backed off of  
6 a lot of stuff he said in the deposition and, you know,  
7 started telling the truth. I mean I can't remember  
8 everything that went on during that thing and what was said.  
9 I stepped out a couple of times.

10 Q If we were to go through your father's  
11 testimony, Mr. Berge, we would see that your father didn't  
12 start telling the truth there, did he?

13 A I was never deposed about this and he  
14 never gave me a chance to tell my side. If I had actually  
15 got up there I would have told the truth, regardless of  
16 whether it hurt my father or not. That's what I did at the  
17 deposition when you finally gave me a chance to speak for  
18 myself but it was already in Bankruptcy Court and I had  
19 already lost. All I can do is tell the truth.

20 Q You never took any steps to ensure that  
21 your father told the truth, did you, Mr. Berge?

22 A No, I've been very non-proactive about  
23 this whole thing. When I found out he was being sued, I  
24 said, "This is your mess, you figure it out, you get the  
25 attorney. I don't want to hear about it unless I have to."



1 And maybe that was bad on my part but I didn't want to have  
2 anything to do with it.

3 Q And what you didn't want to have anything  
4 to do included the possible consequence to the Plaintiff in  
5 that case, did it, Mr. Berge?

6 A The Plaintiff being my father?

7 Q No, MarketGraphics. You were indifferent  
8 as to whether or not the business that you asked your father  
9 to get a lawyer and defend harmed MarketGraphics, weren't  
10 you?

11 MR. LEFKOVITZ: Your Honor, I'm giving  
12 Mr. Krog a wide berth here but we're talking about a trial  
13 and the action and whether that goes to the maliciousness of  
14 a copyright infringement.

15 THE COURT: Go ahead and ask this  
16 question.

17 BY MR. KROG:

18 Q Mr. Berge -

19 A When my father asked me to help, he said  
20 he was in trouble, he was 70 years old and that he was broke,  
21 and could I help him. He was going to venture out and try to  
22 do something on his own. I didn't ask questions. He's my  
23 father. I've always trusted him. We've had a good  
24 relationship. It wasn't an employee/employer relationship,  
25 it was my father who raised me, who I respected and who I

1 trusted. And I didn't - as far as MarketGraphics, I didn't  
2 know the success of Reanalysis of Memphis.

3 I mean MarketGraphics is great in their  
4 own right and they have a very positive brand I.D. And when  
5 my father's Reanalysis company was competing with them, how was  
6 I supposed to know the outcome? Out of 22 bank clients in  
7 Memphis, they picked my father out of 20. It could have gone  
8 the other way.

9 Q Well, but Mr. Berge, you were working for  
10 your father and you wanted your father to be the one who was  
11 picked, didn't you?

12 A Not even exactly. He needed my help and  
13 I said I would help him and I just kept doing what I'd always  
14 done, regardless of the results. If he had only got a couple  
15 then I probably still would have helped him do the marketing  
16 and vastly decrease the amount of money just as long as, you  
17 know, I could pay my bills. I mean -

18 Q You were going to help your father with  
19 his Reanalysis business whether he took a few clients or all  
20 the clients of MarketGraphics, weren't you?

21 A Uh-huh.

22 Q And is it fair to say, Mr. Berge, that  
23 you consciously disregarded the danger that posed to  
24 MarketGraphics, wouldn't it?

25 A Right.

1                   Q     Let's go back to the preliminary  
2     injunction hearing, Mr. Berge. Afterwards, as I say, your  
3     main thought was not, wow, some of the things that were said  
4     in there were untrue, was it?

5                   A     Oh, I thought there were plenty of things  
6     that were said in there that were untrue.

7                   Q     Well, you didn't confront your father or  
8     confront Mr. Warlick about that, did you?

9                   A     I confronted my father, absolutely. I  
10    ranted and raved all the way on the drive back to Memphis.  
11    There's a text or an email from my father to Dan. His mother  
12    had just died.. We're not going to just rip him apart and,  
13    plus, he's still our attorney.

14                  Q     Well, you've seen this email before,  
15    haven't you, Mr. Berge?

16                  A     No, I haven't but I know of it.

17                  Q     All right, Mr. Berge, I think the record  
18    will show that you produced this email in the case and that  
19    your father forwarded it to you as reflected on the header.  
20    He forwarded it to you on June 3<sup>rd</sup>, the day after it was sent  
21    to Mr. Warlick.

22                  A     Yeah, but he wrote it to Warlick.

23                  Q     And the one thing that your father said  
24    that you contributed to the discussion here was something  
25    about "we got our ass kicked."

1 A Right.

2 Q And, actually, your father goes on and is  
3 essentially rather harsh to Mr. Warlick in this email, isn't  
4 he? And accusing Mr. Warlick of not being prepared and not  
5 doing his job, and concludes that you lost because  
6 MarketGraphics' attorney had ex parte communications with  
7 Judge Trauer prior to the hearing. Do you remember that part  
8 of the email?

9 A I don't remember reading this. I mean my  
10 dad would forward me stuff all the time. Most of the time I  
11 would just scan it, scan it as in just look it over, and then  
12 just dismiss it.

13 Q Do you share your father's impression,  
14 Mr. Berge, that MarketGraphics' attorney and Judge Trauger  
15 had ex parte communications prior to the preliminary  
16 injunction hearing?

17 MR. LEFKOVITZ: Object to the relevance.

18 THE COURT: Sustained.

19 BY MR. KROG:

20 Q Whatever you said to your father on the  
21 way back to Memphis, Mr. Berge, about the untruth in the  
22 preliminary injunction hearing, that didn't make enough  
23 impression on him to make it into his email to Mr. Warlick,  
24 did it?

25 A No, my dad is a nice guy. He's not



1 going to rip apart our attorney in the state that he's in.  
2 He's about to go and do a memorial service for his mother on  
3 his way. I mean -

4 Q Well that email was sent after Mr.  
5 Warlick's mother's funeral, wasn't it?

6 A That's semantics. His mom just died.  
7 And, also, we didn't want to hurt our relationship between  
8 Warlick. It wasn't done. I thought we were still going to  
9 be in a trial. We didn't know he was not going to like  
10 contest your motion for preliminary injunction and leave me  
11 high and dry.

12 Q Mr. Berge, you knew that, in early  
13 October 2012, that MarketGraphics had seen a letter to  
14 Memphis area clients saying it was going to pick up their  
15 MarketGraphics service, didn't you?

16 THE COURT: Realysis? Which one sent  
17 what?

18 MR. KROG: I'll rephrase that to make the  
19 history clear, Your Honor.

20 BY MR. KROG:

21 Q After your father sent his email you  
22 looked at on September 28, 2012, requesting to terminate his  
23 associate agreement with MarketGraphics, MarketGraphics  
24 agreed to that termination, didn't they?

25 A Right.

1                   Q     Your father didn't tell them at that time  
2     that he was going to be operating this competing business,  
3     did he?

4                   A     Not that I'm aware of.

5                   Q     And you knew that several days after  
6     that, the first week of October, 2012, that MarketGraphics  
7     Research Group sent a letter to the clients in Memphis who  
8     had been using MarketGraphics of Memphis, saying, in  
9     substance, Mr. Berge is retiring and will be unable to  
10    provide your MarketGraphics service now, correct?

11                  A     I can't remember if I actually read the  
12    letter or not, or if my father just, basically, told me about  
13    it.

14                  Q     And if we look back at your deposition,  
15    you remembered more clearly then, Mr. Berge.

16                  A     Yes. It's been two years since my  
17    deposition so - what line are we looking at?

18                  Q     Right down at the very bottom. And  
19    there's a cross-reference in here but from Lines 22 on down,  
20    you were asked, "Did you have any understanding when you read  
21    the statement before it was sent out (inaudible - static) as  
22    to what letter this Plaintiff was referring to?" And you  
23    answered, "I was aware that Edsel Charles had sent out a  
24    letter but I didn't read it."

25                  A     Okay.

1 Q So, you knew that letter had gone out.  
2 And the letter, Mr. Berge, was this letter to clients that  
3 I've been speaking of, saying that MarketGraphics would be  
4 taking over their service.

5 A Right.

6 Q So, you knew that that's what  
7 MarketGraphics was going to do, that they were going to be  
8 asserting their rights under the associate agreement to  
9 continue servicing the clients after your father terminated?

10 A I never read the associate agreement but  
11 yeah.

12 Q Well, you knew that it had a non-compete  
13 provision, correct?

14 A Right, that I was told continuously that  
15 it wasn't valid, but yes.

16 Q And you knew that MarketGraphics was  
17 going to come in and (inaudible) to the non-compete, pick up  
18 the clients that had been your father's, correct?

19 A That's correct.

20 Q And you are aware, aren't you, that Judge  
21 Trauger ultimately ruled that those clients belonged to  
22 MarketGraphics, correct?

23 A Right, because in the preliminary  
24 injunction you weren't saying that they were my father's  
25 clients. Bulso kept saying they were MarketGraphics'

1 Nashville clients the whole time, which I disagree with.

2 Q Well, Judge Trauger disagreed with you,  
3 Mr. Berge, didn't she?

4 A She agreed with Bulso, yes.

5 Q That those clients had been cultivated by  
6 -

7 A She just said that they were our clients.

8 Q They were the clients your father had  
9 cultivated pursuant to the associate agreement with  
10 MarketGraphics for MarketGraphics' benefit, correct?

11 A For MarketGraphics' benefit?

12 Q MarketGraphics had the right to service  
13 those clients after your father terminated, after the  
14 associate agreement was terminated?

15 A If that's what it said on the associate  
16 agreement, yes.

17 Q There was a letter sent out from Reanalysis  
18 of Memphis in response to the letter that we previously  
19 talked about from Mr. Charles, wasn't there?

20 A Yes, what my dad liked to refer to as the  
21 verification letter.

22 Q And if we look briefly at Exhibit 48 -

23 A The one from October 4, 2012?

24 Q Yes, Mr. Berge. You understand that  
25 that's the letter from Edsel Charles that we've referred



1 to, correct?

2 A Yes. I never read this.

3 Q But that's the letter to which your  
4 father referred?

5 A That's correct.

6 Q If we look at Exhibit 58, Mr. Berge, this  
7 is what you referred to a minute ago as the verification  
8 letter, isn't it?

9 A That's correct.

10 Q You saw this letter before it was sent,  
11 didn't you, Mr. Berge?

12 A That's correct.

13 Q And the letter was sent as an attachment  
14 to an email to all of the people for whom your father had  
15 been doing business in Memphis?

16 A Yes, I would assume so.

17 Q Can we turn to the second page, Mr.  
18 Berge? This letter is written in your name, isn't it?

19 A That's correct.

20 Q And it was written in your name when you  
21 read it before it was sent?

22 A That's correct; it was.

23 Q And when you looked over this letter  
24 before it was sent, you didn't object to anything in it, did  
25 you?

1 A No.

2 Q In fact, you told your father that it was  
3 fine.

4 A Yes.

5 Q And you agree, Mr. Berge, that this  
6 letter is an attempt to persuade the various people with whom  
7 your father had been doing business in Memphis to keep doing  
8 business with him via Reanalysis of Memphis and not to do  
9 business with MarketGraphics, don't you, Mr. Berge?

10 A It could be perceived that way. I think  
11 his intention was to inform the clients that MarketGraphics  
12 of Memphis was no longer going to be audited by my father and  
13 myself. There's other stuff in there, too.

14 Q There's quite a bit more in here, isn't  
15 there, Mr. Berge?

16 A Yes.

17 Q Including, Mr. Berge, several statements  
18 that are just plain false, aren't they, Mr. Berge?

19 A Which ones are you referring to?

20 Q Well, if you'll look at the second  
21 paragraph, you'll see that the LGLG (phonetic) letter was  
22 sent to those who have been clients of my father, Donald  
23 Berge, for many years. And in bold, "who have not been  
24 clients of MarketGraphics Research Group in Nashville."  
25 That's not a true statement, is it, Mr. Berge?

1 A I believe it to be true, yes.

2 Q Well, Judge Trauger determined that it  
3 wasn't true, didn't she, Mr. Berge?

4 A By the motion for summary judgment?

5 Q The preliminary junction hearing on May  
6 31, 2013, Judge Trauger said, in words of one syllable,  
7 essentially, that these people had been clients, that they  
8 were MarketGraphics' clients.

9 MR. LEFKOVITZ: Your Honor, I object to  
10 that. We're sitting up here and the witness has testified  
11 that he believed it to be a truthful statement. Whether or  
12 not the Court agreed or accepted that opinion, it was still  
13 his opinion at the time he uttered it that he believed that  
14 paragraph. The Court disagreed with that. That doesn't make  
15 it false.

16 THE COURT: Go ahead. Move along.

17 BY MR. KROG:

18 Q Mr. Berge, you knew when you -

19 A In addition to that, we have evidence, my  
20 father has evidence that never came to light that disputes  
21 these things but we never got a trial.

22 Q Mr. Berge, you were aware when you read  
23 this letter that your father had a non-compete with  
24 MarketGraphics, correct?

25 A Yes. I was told on most locations he

1 did not believe it to be valid.

2 Q Looking at the fifth paragraph, Don Berge  
3 terminated, that sentence isn't a true statement either, is  
4 it, Mr. Berge? Isn't it true that the associate agreement  
5 was terminated by mutual consent of your father and  
6 MarketGraphics?

7 A Semantics.

8 Q That's not a true statement, is it, Mr.  
9 Berge?

10 A He initiated the termination and they  
11 agreed.

12 Q Mr. Berge, your father did not  
13 unilaterally terminate the associate agreement, did he?

14 A I don't know what you mean by that.

15 Q The last sentence of that same paragraph,  
16 Mr. Berge, there's a reference to the Realysis data tool.

17 A Uh-huh.

18 Q That was an online accessible electronic  
19 database that included the market data that was found in the  
20 reports, wasn't it, Mr. Berge? I'm just asking a question  
21 about the data tool, Mr. Berge.

22 A Back in 2009?

23 Q Between 2009 and 2012. The data tool was  
24 an electronic database that you accessed and downloaded  
25 housing market information, correct?



1 A Yes.

2 Q There was no forecasting function in that  
3 data tool, was there, Mr. Berge? It was just data?

4 A Right.

5 Q So, when this letter says that the data  
6 tool existed to address questionable and statistically  
7 unsound forecasting methodology in the MarketGraphics Report,  
8 that's not a true statement, is it? It had nothing to do  
9 with the forecasting, did it? There was no connection  
10 whatsoever between the data tool and MarketGraphics'  
11 forecasts?

12 A I don't know the answer to that. My dad  
13 created the data tool and he made this statement, so  
14 inadequacies and deficiencies, I had nothing to do with the  
15 back end of MarketGraphics of Memphis and I had nothing to do  
16 with the back end software of Realysis, and I didn't read the  
17 reports. So, once again, I was just going off my father's -

18 Q Mr. Berge, you told us just a moment ago  
19 that the data tool didn't contain forecasting, didn't you?

20 A I believe so. I don't believe my father  
21 did forecasting.

22 Q So there wouldn't be any connection  
23 between the data tool and MarketGraphics and forecasting,  
24 would there be?

25 A I guess not.

1 Q Will you turn to the second page, Mr.  
2 Berge? Look at the second-to-last paragraph. "I feel that  
3 the degree of accuracy and detail that will go into the  
4 future MarketGraphics Reports will not approach the accuracy  
5 and detail of the Reanalysis Reports." You had no way to  
6 guarantee that, did you, Mr. Berge?

7 A I believe it to be true.

8 Q You and your father both believe that?

9 A Yes. I was real meticulous with making  
10 sure I had everything right and after driving the area for 15  
11 years I had gotten to know the market pretty well (inaudible)  
12 another city and just do a blitz.

13 Q Mr. Berge, this letter doesn't mention  
14 the fact that your father has a non-compete agreement with  
15 MarketGraphics, does it?

16 A That's correct.

17 Q And you agree that if the non-compete is  
18 enforceable, could we assume that, and if the letter is  
19 misleading by omitting it?

20 MR. LEFKOVITZ: Objection. That calls  
21 for a conclusion.

22 THE COURT: I'll let him answer.

23 THE WITNESS: Can you ask that again?

24 MR. KROG: Right.

25 BY MR. KROG:

1                   Q     If your father's non-compete with  
2 MarketGraphics is enforceable, the letter, by failing to  
3 reference it, is misleading, isn't it, Mr. Berge?

4                   A     I don't think the letter itself is  
5 misleading. It's all pretty factual. He was working on the  
6 knowledge that it was wasn't valid and I don't think it's  
7 common practice to inform people that you have a non-compete  
8 that you've been told by your lawyers is not valid.

9                   Q     Well, Mr. Berge, didn't you agree in your  
10 deposition with my statement? You are giving an assessment,  
11 you will agree, though, Mr. Berge, that if the (inaudible)  
12 precluded from selling market research services to the  
13 recipients of this letter that the letter would be  
14 misleading. You answered, "Yeah, that's if the non-compete  
15 was valid."

16                  A     That's right. That's what I'm saying.

17                  Q     You agree, Mr. Berge, don't you, that the  
18 presence of the non-compete and the fact that your father was  
19 breaching it by continuing the market research business, that  
20 might be something that people that he's sending that letter  
21 to might want to know?

22                  A     Possibly.

23                  Q     I mean you agree that a bank might want  
24 to know if it's doing business with somebody who doesn't keep  
25 his agreements?

1 MR. LEFKOVITZ: Again, Your Honor, that  
2 calls for a conclusion. There's no way he can answer that.

3 THE COURT: Go ahead and answer. I'm not  
4 sure how relevant that is but go ahead.

5 THE WITNESS: Would you repeat it again?

6 BY MR. KROG:

7 Q You agree that a bank might like to know  
8 if it's doing business with somebody who doesn't keep  
9 agreements he signs?

10 A Possibly, yes.

11 Q It's more likely than not.

12 A In a relationship with my father for 10  
13 or 15 years, if he had mentioned that there was a non-compete  
14 but that he was fighting it, there's still a good chance I  
15 would have gone with him anyway.

16 Q You agree that it's more likely than not,  
17 Mr. Berge, that a bank -

18 A I have no idea what bankers would think.  
19 I have no idea what decisions they make. I don't know  
20 (inaudible).

21 Q Do you think banks, generally, like  
22 dealing with dishonest people?

23 MR. LEFKOVITZ: Objection.

24 THE COURT: Sustained, sustained.

25 Speculative.



1 BY MR. KROG:

2 Q Do you like dealing with dishonest  
3 people, Mr. Berge?

4 MR. LEFKOVITZ: Objection, Your Honor,  
5 that's argumentative.

6 THE COURT: Sustained.

7 BY MR. KROG:

8 Q Mr. Berge, you told your father that the  
9 October 30 letter was fine, didn't you?

10 A Yeah. He asked me, you know, look  
11 through it and see if you see any typos. I gave it a quick  
12 through and I said, "That's fine with me." I didn't sit  
13 there and pick it apart.

14 Q You didn't tell him not to send it with  
15 your name on it?

16 A No, I didn't not.

17 Q One of the reasons your father sent this  
18 letter with your name on it, Mr. Berge, is because he knew  
19 that when he was sued by MarketGraphics it would become  
20 evidence and it would support his defense that -

21 MR. LEFKOVITZ: Objection. That's beyond  
22 -

23 THE COURT: Sustained. I don't know what  
24 he knew about what his father thought or - his father can say  
25 what he knew.

1 BY MR. KROG:

2 Q Mr. Berge, you knew, in October of 2012  
3 when you looked at this letter, that if and when you were  
4 sued by MarketGraphics, as you were anticipating, that the  
5 letter would become a piece of evidence, didn't you, Mr.  
6 Berge? You knew that it would be available -

7 A You give me too much credit, man. I  
8 didn't - this was not my baby. This was my father's doing.  
9 He asked me what I thought and I said yes but I didn't make  
10 decisions that - I was so very much in the backseat I  
11 probably wasn't even in the car. I mean I'm not even living  
12 in Memphis. He's not asking me permission to do all this  
13 stuff. And to the extent of the emails that he wrote under  
14 my name, I had no idea of the extent of it. The only one I  
15 knew for sure was this one.

16 Q Well, Mr. Berge, you've admitted  
17 previously in this case that you sent several other emails  
18 that were related to the October 30 email, haven't you?

19 A No. My dad might have sent them and put  
20 my name on them.

21 Q Mr. Berge, do you recognize Exhibit 65 as  
22 the responses that you gave to certain discovery requests in  
23 this case? You can look at them in the book there behind  
24 you. It's at Tab 65, Volume 2.

25 A Okay.

1 Q And if you turn to the end in the book or  
2 look at the screen on Page 29, that's your signature, isn't  
3 it, Mr. Berge?

4 A You're talking about Exhibit 65, correct?

5 Q Yes.

6 A My page goes to 25.

7 Q I believe they're in there out of order.  
8 Would you look at the second-to-last page?

9 A Yeah, it goes to 29 and then the one  
10 after it goes to 25.

11 Q That's your signature, isn't it, Mr.  
12 Berge?

13 A Yes.

14 Q If we could look at Page 22. No. 5 in  
15 the middle of the page, your response here, Mr. Berge. Your  
16 response, Mr. Berge, is that you sent certain communications  
17 that were attached as Exhibit 1 to the requests, correct?

18 A Right. It says, "And sending the  
19 communication was to clarify the distinction between  
20 MarketGraphics Research Group and Realysis, that I'm  
21 admitting to having read the verification letter. That is  
22 the only thing I read with my name on it that my father  
23 sent."

24 Q Well, that's not what you say in number  
25 five here, is it, Mr. Berge?

1 A Yes, it is.

2 Q Where in your response to No. 5 here, Mr.  
3 Berge, does it say that you only read one letter with your  
4 name on it and didn't send any of them?

5 A It's clear by my last statement it was a  
6 clarification letter.

7 Q The last statement being the last  
8 sentence in this response? Because I see a sentence that  
9 says Mr. Berge's purpose in sending the communication.

10 A Yeah, the communication.

11 Q You'll agree, Mr. Berge, won't you, that  
12 the request asks about - you'll agree, Mr. Berge, that the  
13 response doesn't say anything about which communication?

14 A That's what it's referring to.

15 Q And Mr. Berge, I'd like you to look at  
16 Exhibit 54.

17 A Going back to one, right?

18 Q No, it's still Binder two.

19 A Fifteen?

20 Q Pardon me?

21 A Fifteen?

22 Q Fifty-four.

23 A Okay.

24 Q And if you turn to Page 24, that would be  
25 the page which, Exhibit 1 to which that previous answer



1 was referring again, isn't it, Mr. Berge?

2 A (Inaudible).

3 Q And then behind that page there are an  
4 email from October 30, the October 30 letter which was  
5 attached to it, and October 31 email and November 9 email.

6 A You want me to read -

7 Q No, I didn't ask you to read any of them,  
8 I just was - those are the documents that were Exhibit 1 to  
9 that discovery request, correct?

10 A I imagine.

11 Q You knew, Mr. Berge, didn't you, that  
12 many of the people with whom your father was doing business  
13 would do business with Reanalysis of Memphis, didn't you?

14 A I didn't know that to be a fact.  
15 MarketGraphics could have took them all as far as I know.

16 Q You didn't want that to happen, though,  
17 Mr. Berge, did you?

18 A Honestly I didn't give it much thought.

19 Q You didn't really think about whether or  
20 not what you were doing would harm MarketGraphics, did you,  
21 Mr. Berge?

22 A Once again -

23 Q You wanted to get -

24 THE COURT: Let him answer first.

25 THE WITNESS: Once again, my

1 relationship with my father is a strong one. I could tell  
2 his back was up against the wall and he asked for my help.  
3 That was my main focus was to help my parents from not being  
4 broke at retirement age. I had always viewed those clients  
5 to be my father's but my dad has (inaudible) that they were  
6 his clients. It just never came into play. My goal was to  
7 help my family survive. That's something any son would try  
8 to do.

9 BY MR. KROG:

10 Q And you did help your father operate  
11 Realysis of Memphis, didn't you?

12 A I helped him as far as nine weeks,  
13 actually it was up to 12 weeks over the course of a whole  
14 year. If you want to say that was helping him immensely,  
15 then that's your opinion. I don't think 12 weeks a year is  
16 considered anything that -

17 Q Well, that's all it took to produce the  
18 data in the books, wasn't it, Mr. Berge?

19 A (Both speaking). It was his consulting  
20 and he had an ongoing relationship and they were buying into  
21 Don Berge, they weren't buying into Realysis.

22 Q Mr. Berge, the -

23 A My -

24 THE COURT: Whoa, one at a time. Ask the  
25 question.

1 BY MR. KROG:

2 Q The nine to 12 weeks of driving, Mr.  
3 Berge, which was not all you did, was it, Mr. Berge? We've  
4 seen that today, correct?

5 A Yes, there was some research that was  
6 required before you could do the drives.

7 Q Mr. Berge, that was all it took to  
8 produce the data that was in the book, wasn't it?

9 A That's correct.

10 MR. KROG: No other questions at this  
11 time, Your Honor.

12 THE COURT: Okay, let me ask a question.  
13 Do you all want lunch or are you willing to go all the way  
14 through? I'm going to take a break right now. It's only  
15 going to be five minutes or we can break later for lunch.

16 MR. LEFKOVITZ: Your Honor, my cross-  
17 examination of Mr. Berge will take 10 minutes.

18 THE COURT: Okay. Let's take a five-  
19 minute break.

20 (Brief recess)

21 CLERK: All rise.

22 THE COURT: Be seated.

23 CROSS-EXAMINATION

24 BY MR. LEFKOVITZ:

1                   Q     Mr. Berge, thank you for your testimony  
2 this morning. Let me ask you one question and I think it  
3 goes to the essence of the issue before the Court. Your  
4 testimony, as I heard in the last couple of hours, was that  
5 all of your actions were predicated on your father telling  
6 you that the non-compete was invalid; is that correct, sir?

7                   A     That's correct.

8                   Q     Had your father told you that based on  
9 his discussions with lawyers that the non-compete was valid  
10 and that he couldn't do this, would you have gone down this  
11 road?

12                  A     No.

13                         MR. LEFKOVITZ: I turn the witness over.  
14 Thank you.

15                         THE COURT: Re-Cross - Redirect?

16                         MR. KROG: No Redirect, Your Honor.

17                         THE COURT: You may step down, sir. Next  
18 witness? Question: Do you all want to have lunch or do you  
19 all want to just keep plowing through this?

20                         MR. KROG: If Mr. Lefkovitz would like a  
21 break for lunch I am perfectly content to take it now, Your  
22 Honor.

23                         MR. LEFKOVITZ: I'll leave it to the  
24 Court's discretion.

25                         THE COURT: Let's keep going.



1 MR. LEFKOVITZ: Let's keep going on this.

2 THE COURT: We might have a late lunch.

3 MR. LEFKOVITZ: Or we can send out.

4 MR. KROG: Your Honor, the Plaintiff  
5 calls Mr. Donald Berge to the stand.

6 MR. LEFKOVITZ: Your Honor, just so we  
7 know the parameters -

8 THE COURT: Let's not talk about what  
9 we're doing here.

10 MR. LEFKOVITZ: Okay, then let's just  
11 keep going and I'll wait to see where -

12 THE COURT: Because he was outside.

13 MR. LEFKOVITZ: All right. I heard no  
14 names.

15 (Witness sworn)

16 CLERK: State your full name for the  
17 record, please.

18 THE WITNESS: Donald John Berge.

19 THEREUPON came

20 D O N A L D J O H N B E R G E

21 Who, having been first duly sworn according to law, testified  
22 as follows:

23 DIRECT EXAMINATION

24 BY MR. KROG:

25 Q Good Morning, Mr. Berge.

1 A Hello.

2 Q Mr. Berge, you worked from 1997 until  
3 2012 under the name MarketGraphics of Memphis under an  
4 associate agreement with MarketGraphics Research Group, Inc.,  
5 didn't you?

6 A MarketGraphics National.

7 Q Was the name under which the agreement  
8 was signed?

9 A Yes.

10 Q And then MarketGraphics National later  
11 changed its name to MarketGraphics Research Group?

12 A Yes.

13 Q If you will please look in the second of  
14 the two black binders that are there.

15 A The one on top?

16 Q I'm afraid I don't know which one is on  
17 top, Mr. Berge.

18 A All right, what do I need to look for?

19 Q Tab 29.

20 A Some of this is upside down.

21 Q Is Exhibit 29, Mr. Berge, the associate  
22 agreement you had with MarketGraphics?

23 A Yes.

24 MR. KROG: Your Honor, I would move that  
25 Exhibit 29 be admitted into evidence.

1 MR. LEFKOVITZ: No objection.

2 THE COURT: Be admitted.

3 (Exhibit 29 admitted)

4 BY MR. KROG:

5 Q Your son is Mr. David Berge, correct?

6 A Correct.

7 Q And he worked with you during the period  
8 you were doing business as MarketGraphics of Memphis,  
9 correct?

10 A He did some of the audit work.

11 Q You took steps over the years, during the  
12 MarketGraphics of Memphis period, to introduce the banks with  
13 which you did business and the appraisers and the other  
14 people that you did business as MarketGraphics of Memphis,  
15 you took steps to introduce those people to David during the  
16 MarketGraphics of Memphis period, didn't you?

17 A During the MarketGraphics of Memphis  
18 period, if I introduced David it was probably in a group  
19 setting. I held meetings with my clients and sometimes he  
20 was there if he was in town.

21 Q If you'd look at Tab 36, please, Mr.  
22 Berge. Is this a letter you sent in February of 2004 to  
23 clients in the Memphis area?

24 A Yes.

25 Q And you say in this letter that your

1 son has agreed to take on a more prominent role with  
2 MarketGraphics?

3 A This letter says that he had been doing,  
4 he had only been auditing only the Shelby County and now he  
5 was going to add DeSoto, which is another big piece of it,  
6 for his audit, to do the audit work. Because I was starting  
7 to work - it was a temporary job that ended up being over two  
8 years, but as manager of the commercial real estate group for  
9 InSouth Bank in Memphis, who was one of my clients at the  
10 time. They hired me because the manager of the group had  
11 left and they wanted me to fill in for him. So, David would  
12 have to do more of the audit work.

13 Q And he agreed to do that, didn't he, Mr.  
14 Berge?

15 A Yes.

16 Q And if you'll look at the next tab, Tab  
17 37. Is this a letter that you sent in October of 2005 to the  
18 same Memphis area clients?

19 A I was still at InSouth, right.

20 Q This is a letter you sent in October  
21 2005?

22 A Yes.

23 Q On the second page of this letter you,  
24 again, refer to your son, David, don't you, Mr. Berge?

25 A Yes.



1                   Q     And is it true that he was handling  
2     virtually all of the field audit work?

3                   A     He did mostly Shelby County.  There were  
4     a few areas in Shelby County that I always did, and he was  
5     doing most of DeSoto County.  I was doing three counties and  
6     a little bit of Shelby.

7                   Q     And the people with whom you did business  
8     as MarketGraphics of Memphis knew that because you told them  
9     that David helped out with the business, correct?

10                  A     Right.

11                  Q     Following the termination of your  
12     associate agreement with MarketGraphics, did you transition  
13     to a gopher role for David's Realysis Memphis business?

14                  A     I was starting to make moves toward being  
15     retired.  In fact, my - and you've seen this, I'm sure - my  
16     termination letter was the fax that was a reply fax - not a  
17     reply fax but a reply email to them because it had the  
18     caption, "Thinking about retirement."  I had gotten an email  
19     from the office saying Edsel wanted everybody to see this.  
20     It was a bunch of information about retiring.  So, I replied  
21     to that and in that I said, "I'm going to terminate as of  
22     September 28."  So, I was thinking in terms of doing - I was  
23     moving toward retirement.  I was 69 years old at the time.  
24     But with a lawsuit coming, it stopped all that.  So, I  
25     basically continued to operate the business.

1 Q Well, Mr. Berge, didn't you previously  
2 testify on this topic as follows: (Audio of Mary 13, 2013  
3 deposition played in open court.)

4 Do you recall giving that testimony, Mr.  
5 Berge?

6 THE COURT: Did you answer that question?  
7 Do you recall giving that testimony?

8 THE WITNESS: Yes.

9 THE COURT: Okay. You have to speak into  
10 the mic.

11 THE WITNESS: Oh, I need to get closer to  
12 the mic, don't I? I'm sorry.

13 BY MR. KROG:

14 Q Was that truthful testimony, Mr. Berge?

15 A I was trying to retire. A lawsuit  
16 stopped me.

17 Q You can try to retire and hand the  
18 business operations for the new Reanalysis of Memphis over to  
19 your son because he knew the business pretty well, didn't he?

20 A He knew how to audit the business; he  
21 knew how to do the audits.

22 Q Well, Mr. Berge, isn't it true that you  
23 would take David with you sometimes to see banks, bank  
24 representatives, and that he could answer questions regarding  
25 the consulting work even better than you could?

1                   A     If they had a question about a particular  
2 subdivision that he had audited, that's true.

3                   Q     Mr. Berge, I'm going to ask if you  
4 remember giving some testimony during a previous deposition -

5                   A     Three years ago? Is that the one you're  
6 talking about?

7                   Q     "Mr. Berge, in your opinion, are you  
8 identified with Reanalysis of Memphis among persons in the  
9 Memphis community?" And you said, "They know my son; they  
10 got letters from my son."

11                  A     Uh-huh.

12                  Q     They know my son, David, as the principal  
13 of Reanalysis of Memphis, and they've been dealing with me for  
14 15 years, there's nobody else, and I'm on their speed dial so  
15 they call me. Why wouldn't they? I'm a consultant. I mean  
16 I consult. I had one the other day say, 'Let's go to lunch.  
17 Questions about the market and about selling lots for the  
18 bank and all these kind of things.' And it had nothing to do  
19 with the report, they just wanted some advice."

20                         Question: In your opinion, would David  
21 be able to provide those same consulting services? And your  
22 answer: Yes. Follow-up question: Equally as well? And you  
23 said: I've had some banks have us both come. And he knew  
24 more detail about the market when they started asking than I  
25 did. He knows that stuff because he audits it. See, I

1 don't audit hardly at all.

2 Do you remember that testimony, Mr.  
3 Berge?

4 A Yeah. I mean it's three years ago. I  
5 can't tell you I agree.

6 Q Was that truthful testimony at the time,  
7 Mr. Berge?

8 A I remember - I was probably referring to  
9 our visit to the Bank of Bartlett when we had a couple of the  
10 owners of the company were asking him a lot of questions  
11 about this one particular subdivision that he had audited,  
12 and he knew all about the subdivision because he audited it.  
13 So, he knew more in that meeting than I did on that  
14 particular subdivision. I'm sure that's what it was. And  
15 he's probably only gone to about five of them with me.

16 Q And those are the five you went to during  
17 the Realysis of Memphis period, isn't it?

18 A Right.

19 Q When you took him to introduce him as the  
20 President of Realysis of Memphis?

21 A I don't know if I said President of  
22 Realysis of Memphis.

23 Q You took the books with you when you went  
24 on those meetings, didn't you, Mr. Berge?

25 A Yeah.



1 Q And if you look at the Reanalysis Book,  
2 it's right there next to you on the ledge.

3 A Yes.

4 Q On the second page where it says, "Dear  
5 Client."

6 A Second page. Page two or -

7 Q It's not numbered but it is Page 2.

8 A Oh, okay.

9 Q And that introductory letter to this  
10 report is signed David P. Berge, isn't it?

11 A It's not signed but that's his name.

12 Q It says, "Sincerely, David P. Berge,"  
13 doesn't it, Mr. Berge?

14 A Correct. I wrote it.

15 Q And you gave it to these people in  
16 Memphis with whom you were doing business, correct?

17 A Memphis and other places.

18 Q Including all these visits -

19 A Most of these were sent either by U.S.  
20 Postal Service or FedEx or sometimes - but we delivered a  
21 couple of them in DeSoto County real close by where I live.  
22 There was about five of them.

23 Q And you took them in person and David  
24 went with you?

25 A That's true.

1 Q The Reanalysis of Memphis business, Mr.  
2 Berge, was a continuation of what you had been doing as  
3 MarketGraphics of Memphis, correct?

4 A Say that again, please.

5 Q Sure. The Reanalysis of Memphis business  
6 was a continuation of what you had been doing as  
7 MarketGraphics of Memphis, correct?

8 A Yes.

9 Q Your reports had the same basic data in  
10 them?

11 A I started Reanalysis in '09 -

12 Q I'm only asking about the report, Mr.  
13 Berge.

14 A I continued what I had started in '09.  
15 And, also, it was a continuation of what I did at  
16 MarketGraphics of Memphis, except we had additional  
17 information and better graphs and better stuff in there to  
18 help the clients, per their requests.

19 Q Again, Mr. Berge, my question was only  
20 about the books. I'm going to ask if you remember giving the  
21 following testimony. Down at the bottom your attorney asked  
22 you -

23 A When was this?

24 Q You were present at the preliminary  
25 injunction hearing on May 31, 2013?

1 A Yes, I was.

2 Q And you testified at that hearing?

3 A Yes.

4 Q And do you remember Mr. Warlick asking  
5 you the question, "Tell me in your opinion and your  
6 experience whether or not what Metro Study does is unique in  
7 any way or different from what MarketGraphics does." And  
8 the Court didn't actually let you answer that question. So,  
9 Mr. Warlick asked you, "Which one came first?" And you said,  
10 "Metro Study was started in 1975." And then for several  
11 lines we talk about Metro Study and Mr. Warlick asks you,  
12 "And now Mr. Berge is in the business of putting together  
13 these types of data collection books, correct?" And you  
14 said, "Yes."

15 A Wait, is that on this page?

16 Q I'm looking at the one on the screen.

17 A Right.

18 Q If you'll look on Line 19, Question:

19 "Now, Mr. Berge is in the business of putting together these  
20 types of data collection books, correct?" Answer: "Yes."  
21 And if we look one line up, he's referring there to - you're  
22 referring there to Mr. David Berge, aren't you?

23 A Pardon me?

24 Q When you answered that question you were  
25 referring to Mr. David Berge? Now Mr. David Berge is in

1 the business.

2 A Now Mr. Berge - who was asking that  
3 question?

4 Q If we were to go back and look at this it  
5 would reflect that Mr. Warlick was asking the question.

6 A Okay, because I don't see that. It's  
7 expanded and I don't see the numbers on the side. Okay, so  
8 Dan Warlick is saying, "Now Mr. Berge -" I don't know.  
9 Who's he talking about? I was the only witness. It must  
10 have been me, right?

11 Q Well, Mr. Berge, let's go back up. Let's  
12 look at Line 13. Mr. Warlick ask you, "Now, you have heard  
13 it said or it was suggested that you are running Reanalysis of  
14 Memphis, LLC. Do you own stock in that company?" Answer:  
15 "No." Question: "Who owns all of it?" Answer: "It's a  
16 (inaudible) LLC and it's David Berge." Question: "Now, Mr.  
17 Berge is in the business of putting together these types of  
18 data collection books, correct?" Answer: "Yes."

19 And then there's some discussion about  
20 procedural matters and after we get out on the next page,  
21 Line 8, Mr. Warlick asks, "David Berge puts together this  
22 same type of data?" Answer: "Yes." Question: "You admit  
23 that it's similar to this type of data entry that's put  
24 together?" Answer: "Same basic data."



1                   And the point of all that, Mr. Berge, was  
2   you did testify, didn't you, that the Realysis Books and the  
3   MarketGraphics Books contain the same basic data about the  
4   housing market, correct?

5                   A     Same basic data as Metro Study? That's  
6   what was on there.

7                   Q     As Metro Study and as MarketGraphics of  
8   Memphis.

9                   A     Well, Metro Study has much more data and  
10   are much more thorough so I wasn't doing everything they did.  
11   And, of course, MarketGraphics wasn't coming near what they  
12   did. There's an expression they had in their book, it's  
13   called the four stages of development. That's straight out  
14   of Metro Studies. I think Edsel has copied a bunch of that  
15   stuff but when we audit the field, for auditing the same  
16   subdivisions as MarketGraphics, when I was at MarketGraphics  
17   of Memphis, same subdivisions.

18                  Q     Same subdivisions as Realysis?

19                  A     As this one, but the data wasn't the same  
20   because Realysis was doing it every three months, not every  
21   four months So, we had altogether different data.

22                  Q     Well, the numbers were different,  
23   Mr.Berge, but you were collecting the same categories of  
24   data.

25                  A     No, it was fully different because we

1 did audits at different periods, four times a year. And,  
2 also, we put in median home prices because our clients asked  
3 for them. MarketGraphics would have some kind of a number  
4 that was some kind of an average but it was just really bad.  
5 And so I get a lot of complaints from my clients about  
6 MarketGraphics. So, I changed that report quite a bit to  
7 accommodate what the client wanted.

8 Q Mr. Berge, the types of data that were  
9 being collected, that were being collected by Realysis of  
10 Memphis, were the same types of data that were collected by  
11 MarketGraphics of Memphis?

12 A Basically, there's a house count, the  
13 number of houses. What you do with it is where the  
14 difference is.

15 Q And what Realysis of Memphis did with the  
16 data, Mr. Berge, was put out a book and sold services to  
17 clients in the Memphis area that had previously been serviced  
18 by MarketGraphics of Memphis, correct?

19 A By my clients.

20 Q In fact, it was all the same people.  
21 There weren't any new Realysis of Memphis clients, were  
22 there?

23 A Just my clients. I was just producing a  
24 different looking book for them that was a lot better.

25 Q And because they'd had a

1 relationship with you in the past, Mr. Berge, David  
2 discovered -

3 A Who discovered?

4 Q David discovered that these clients, in  
5 many cases, did business with Reanalysis, correct?

6 A David discovered it? I don't know what  
7 kind of question that is.

8 Q Well, Mr. Berge -

9 A I mean he had become aware of it -

10 Q Mr. Berge, isn't that exactly what you  
11 said in your previous deposition?

12 A Of course, he would have discovered it.

13 Q (Recording of deposition question played  
14 in open court.)

15 A Right, his company.

16 Q There were certain client verification  
17 letters, to use your phrase, that were sent out in October  
18 and November of 2012, to businesses with which you did  
19 business in Memphis, correct? About the Reanalysis of Memphis  
20 business.

21 A Do you have them here? Can we see them?

22 Q I'm just asking the question.

23 A Refresh my memory; it's been three years.

24 Q If you'll turn to Tab 57, Mr. Berge.

25 A Okay, yes, real short, right? Real

1 short letter.

2 Q Mr. Berge, that's an email that David  
3 sent on October 30, 2012, isn't it?

4 A No, I sent that.

5 Q Is this one of the client clarification  
6 letters?

7 A Are you talking about this one page here?  
8 Right. Yeah, I sent that.

9 Q There is attached another letter, isn't  
10 there, Mr. Berge?

11 A Where is that letter?

12 Q Turn the page of the book, Mr. Berge.

13 A Oh, yes, the purpose of the letter is  
14 clear up the confusion resulting from misleading information  
15 in a letter from Edsel Charles.

16 Q This is one of the client clarification  
17 letters, correct?

18 A Right.

19 Q And you've previously testified that  
20 David sent this letter, haven't you?

21 A I wrote it. I put his name on it. As  
22 I'm moving into retirement, I'm trying to get people aware to  
23 start to communicate with David -

24 Q Well, Mr. Berge, you've just contradicted  
25 two things that you just said previously under oath,



1 didn't you?

2 A I don't know.

3 Q (Video deposition excerpt played in open  
4 court) And if we look at Tab 59 in the book, Mr. Berge,  
5 that's the letter to which you were referring that was sent  
6 the next day, October 31?

7 A Okay.

8 Q Isn't it?

9 A Okay. Are you talking about what you  
10 just showed in the testimony?

11 Q Yes. You testified, as we saw just a  
12 moment ago, that there were three letters, October 30,  
13 October 31, and November 9.

14 A Right.

15 Q And this is the middle one?

16 A Okay.

17 Q And if we turn to Tab 60, this is the  
18 November 9 letter, isn't it, Mr. Berge?

19 A Yes.

20 Q And you told us at that time, Mr. Berge,  
21 that David sent all three of these communications, didn't  
22 you?

23 A That was the intention for the people who  
24 would see the letter and think it's from him, because I wrote  
25 it.

1 Q And you wanted people to think that it  
2 was from David?

3 A Right.

4 Q That was the plan -

5 A It had to get out. There was a  
6 tremendous sense of urgency because Edsel - one of the  
7 clients gave me the letter that Edsel sent. He said there  
8 was something wrong with this, what's going on here? And so  
9 I said, I've got to clarify this. So I sent this thing out  
10 but -

11 Q What was wrong, Mr. Berge, was that you  
12 all were doing something you had agreed not to do; is that  
13 what was wrong?

14 MR. LEFKOVITZ: Objection (inaudible).

15 THE COURT: Sustained.

16 BY MR. KROG:

17 Q You and David both understood, didn't  
18 you, that you were going to be sending letters to clients  
19 over his name?

20 A I'm not sure David knew it was going out.  
21 He may have.

22 Q Well, Mr. Berge, you showed at least one  
23 of these letters to David before it was sent, didn't you?

24 A Could have.

25 Q In fact, you previously testified

1 that David helped write one of them? (Video excerpt played  
2 in open court.)

3 A He probably proofed it.

4 Q It was a joint effort; isn't that what  
5 you just testified to, Mr. Berge?

6 A He could have.

7 Q And you're referring to these letters  
8 that we've just seen?

9 A Right.

10 Q So, you and David both knew that there  
11 was this effort to represent to people that David was running  
12 Realysis Memphis?

13 A it's his company.

14 Q It's his company. And one benefit of  
15 being his company was that he didn't have a contract with  
16 MarketGraphics, wasn't it?

17 A You know, I set up those three LLCs  
18 anticipating doing a will and estate planning before the  
19 termination. That's why I've got three of them. One was in  
20 my son's name, one was in my wife's and one in mine. That  
21 was the purpose of that.

22 Q Well, Mr. Berge, you weren't setting up  
23 Realysis of Memphis LLC to manage an IRA as part of your  
24 estate plan, were you?

25 A No.

1                   Q     You were setting up Reanalysis of Memphis  
2     LLC to transition the home market research business to your  
3     son, weren't you?

4                   A     In 2009, I started operating as Reanalysis  
5     of Memphis.

6                   Q     Well, that's not entirely true, is it,  
7     Mr. Berge?

8                   A     Wait a minute, wait a minute.  You're  
9     twisting this really bad.  I started this in 2009; I did a  
10    whole database.  My MarketGraphics of Memphis clients could  
11    access the database and they could get a lot of reports they  
12    couldn't get from MarketGraphics.  MarketGraphics just didn't  
13    meet the stuff available.  They couldn't in some cases, I  
14    think.  So they got it free but they were all my  
15    MarketGraphics of Memphis clients.  This went on for three  
16    years.  And then when I got ready to retire I started talking  
17    to Edsel about selling the business and he was unreceptive  
18    and refused to give me permission to sell it to anybody else  
19    other than David.  So, he put me in a bind.  I got a letter  
20    from you, Edsel.

21                  Q     Mr. Berge, isn't it true that Reanalysis of  
22    Memphis wasn't even formed until 2012?

23                  A     That's correct, Reanalysis of Memphis, LLC,  
24    that's correct.

25                  Q     So when you said you'd been



1 doing business as Realysis of Memphis since 2009, that was  
2 not the truth, was it, Mr. Berge?

3 A Yes.

4 Q Now, Mr. Berge, you had been doing  
5 business as MarketGraphics of Memphis.

6 A That's true but all this information,  
7 this whole report was Realysis and that letter I got from  
8 Edsel in 2010, he refers to Realysis when we were talking  
9 about going to Jackson, Mississippi. It was well-known; it  
10 was Realysis.

11 Q Mr. Berge, you were providing a  
12 supplemental database under the name Realysis, weren't you?

13 A Correct.

14 Q You did not produce a written report  
15 until 2012 under the name Realysis, did you?

16 A Right.

17 Q And that was the first time you did  
18 business as Realysis of Memphis, correct?

19 MR. LEFKOVITZ: Your Honor, please, I'd  
20 like to object to the relevancy of this. What does this go  
21 to what Mr. David Berge did or didn't do?

22 THE COURT: How does this go to what  
23 David knew or did?

24 MR. KROG: I'll move on, Your Honor.

25 BY MR. KROG:

1                   Q     Mr. Berge, it's true, isn't it, that you  
2     discussed with your son the prospect of being sued by  
3     MarketGraphics following your termination, didn't you?

4                   A     I told him I might get sued, I suppose.  
5     I don't remember, knowing Edsel.

6                   Q     And you told your son that he didn't have  
7     anything to worry about, didn't you?

8                   A     I was under the impression that this is -  
9     that the non-complete was incomplete as a clause in the  
10    agreement. It didn't have any time limit, it didn't have any  
11    consideration paid for it. So, I didn't think it was valid.

12                  Q     Mr. Berge, one of the reasons that you  
13    told your son that he didn't have anything to worry about is  
14    that he was the one operating Realysis of Memphis, that  
15    everything had his name on it and the story was that you had  
16    retired?

17                  A     I don't remember telling him he had  
18    nothing to worry about. I don't know. When did I do that?  
19    Where are you getting that? This stuff is three years old.  
20    I'm 72 years old.

21                  Q     David knew, didn't he, Mr. Berge, that  
22    you were going to be providing or seeking to provide the  
23    Realysis of Memphis services to the same people you had been  
24    providing MarketGraphics of Memphis services to, correct?

25                  A     Yes. From their standpoint all it

1 was was a name change and a better product coming from the  
2 same source.

3 Q David agreed to help you out with the  
4 Realysis business, didn't he?

5 A He just did the audit. He was never  
6 interested, really. I'm the old man, I was in banking 25  
7 years. I don't know how many times I've seen somebody who's  
8 the old man, he started a business and wants to push it off  
9 onto his son, and the son isn't all that eager about it.  
10 Edsel has probably seen the same thing happen here. And the  
11 old man just keeps trying to get the son to take it over.  
12 Sometimes they do and sometimes they don't. The transition  
13 didn't take place because the lawsuit stopped it all. So, we  
14 just kept on doing what we had to do.

15 Q And Mr. Berge, your son agreed to keep  
16 doing it, didn't he?

17 A The audits.

18 Q Helping out with the business.

19 A Doing the audits.

20 Q Well, I mean it's true, Mr. Berge -

21 A You're putting words in my mouth and it's  
22 not true.

23 THE COURT: Just let him ask the  
24 question.

25 THE WITNESS: Okay.

1 BY MR. KROG:

2 Q Mr. Berge, David did more than just the  
3 audits, didn't he?

4 A We talked about him going with me for  
5 about five different places.

6 THE COURT: That didn't answer the  
7 question. Answer the question.

8 BY MR. KROG:

9 Q Is it your testimony, Mr. Berge, that you  
10 never had a discussion with David in which you said in words  
11 and substance that because Realysis of Memphis was being  
12 operated with the appearance of him as it's owner and  
13 president that MarketGraphics wouldn't be able to shut it  
14 down?

15 A I don't remember saying that. Maybe I  
16 did. I don't know; I don't remember that. Did I testify  
17 that?

18 Q It would have been a lot easier, Mr.  
19 Berge, wouldn't it have, simply to tell people, Hi, I'm  
20 Donald Berge, you know me, this is my new company and my son,  
21 David, is going to come along to some meetings because when I  
22 retire here in a few years he will take over.

23 A I was hoping to retire a lot sooner than  
24 a few years.

25 Q That would have been a simpler thing



1 to do, wouldn't it have been, Mr. Berge?

2 A Yes, it would have been your choice.

3 Q That would have been more honest,

4 wouldn't it have been, Mr. Berge?

5 MR. LEFKOVITZ: Objection.

6 THE COURT: Sustained.

7 BY MR. KROG:

8 Q Mr. Berge, your conclusion that your non-  
9 compete with MarketGraphics was unenforceable was really just  
10 an assumption, wasn't it, Mr. Berge?

11 A Over the years in banking I've talked to  
12 different people, I've been around non-compete agreements, it  
13 was more than an assumption. I felt good about that.

14 Q Mr. Berge, didn't you testify that your  
15 conclusion was an assumption just a few months ago? You were  
16 deposed by Mr. Glassman in your lawsuit against Mr. Warlick -

17 A I didn't -

18 Q Mr. Berge, you have to let me ask the  
19 question. You have a lawsuit against Mr. Warlick, do you  
20 not?

21 A Yes.

22 Q You were deposed in that lawsuit by a  
23 gentleman named Richard Glassman; your deposition was in  
24 December.

25 A Well, the way you just said that,

1 you trivialized the word assumption. Mr. Glassman was not  
2 trivializing it. That's why I said it's more than an  
3 assumption. I did not have a legal opinion on it; I assumed  
4 that's what it was.

5 Q You testified here in December where you  
6 said, "That was my assumption." Mr. Glassman asked, "Your  
7 assumption was that without a time limit in it, it was not  
8 enforceable?" And you answered, "Right." That was just your  
9 assumption, Mr. Berge. You're not a lawyer -

10 A I'm not a lawyer.

11 Q You've never been to law school?

12 A Never been to law school.

13 Q You didn't pass the bar exam after an  
14 apprenticeship in California?

15 A I'm sorry?

16 Q You've never passed a bar exam?

17 A No.

18 Q David never told you, did he, Mr. Berge,  
19 that he objected to the way the Reanalysis of Memphis business  
20 was being operated, did he?

21 A I don't believe so.

22 Q He never told you that he wanted out of  
23 that or that he wasn't going to have any part in your efforts  
24 to compete with MarketGraphics?

25 A I think he assumed we were going to

1 keep doing what we had been doing. He'd been doing it 15  
2 years. Q And he knew that (inaudible) was being  
3 done over his name and not yours?

4 A Yeah, his name was on - he was a  
5 registered agent on that LLC.

6 Q He was a lot more than a registered  
7 agent, wasn't he, Mr. Berge? We've seen that.

8 A We didn't call the company.

9 Q Haven't we seen here today, Mr. Berge,  
10 multiple times where you've told us that Realysis was a  
11 single member LLC and David is the member?

12 A We hadn't gotten that far with it. In  
13 other words, it got administratively dissolved by the  
14 Secretary State because we didn't do any formation  
15 activities. We didn't file anything, we didn't get any  
16 stock, we didn't do any of those things.

17 Q You don't have any knowledge, Mr. Berge,  
18 do you of why LLCs are administratively dissolved by the  
19 Secretary of State, do you?

20 A I think the reason they dissolve it is  
21 because there is no subsequent filing after it's registered.  
22 There's a time limit on there in which you've got to form the  
23 company and have a meeting of the members and get stock and  
24 so on. We didn't do any of that.

25 Q Isn't it true, Mr. Berge, that

1 your position that Reanalysis of Memphis LLC was never formed  
2 is a position that you've adopted for litigation purposes in  
3 your case against Mr. Warlick?

4 A Say that again, please.

5 Q The position that you're espousing now  
6 that Reanalysis of Memphis LLC was never formed, that's a  
7 position that you've adopted for litigation purposes to  
8 advance your case against Mr. Warlick, isn't it?

9 A I don't think so.

10 Q Because if Reanalysis of Memphis were a  
11 effective entity, it would be the one entitled to most of the  
12 damages that you might recover from Mr. Warlick, wouldn't it?

13 A That's interesting concepts you're  
14 throwing at me but you're suggesting that that's what I did.

15 Q And so this idea that Reanalysis of Memphis  
16 never really existed, despite your testimony to the contrary,  
17 that's a (inaudible) rationalization, isn't it?

18 A At the time I testified it had just been  
19 registered and they have like six months or whatever it is to  
20 bring it to pass. We didn't bring it to pass after that  
21 testimony. So, it was in that early stage where we had it  
22 registered but there was no stock in the company. We hadn't  
23 done any of that stuff but it still was valid until they  
24 administratively dissolve it if we don't do anything with it.  
25 But that's what happened. This is three years ago. It



1 was administratively dissolved sometime after that testimony.

2 Q Your son knew in September and October of

3 2012 exactly what you were going to do with Realysis of

4 Memphis, didn't he?

5 A What David knew or what exactly I was

6 going to do with it when I terminated? I didn't know exactly

7 what I was going to do. I was going to continue on doing

8 what we were doing.

9 Q And David knew that?

10 A Customers knew the name Realysis for

11 three years. Every time they logged onto the Realysis.com

12 website they were looking at Realysis reports.

13 Q And David knew -

14 A And Edsel knew it.

15 Q And David knew that you all were going to

16 keep doing what you'd been doing, right?

17 A Yeah, I think so.

18 Q You talked about it, didn't you?

19 A I need to remind you David lived in

20 Nashville. I didn't see him very often. He would come in

21 for three months, focus on doing - for three weeks, focus on

22 doing the audit, and he was very - it consumed his time. He

23 would get up and he'd decide where he was going to go and

24 he'd go and do it. We didn't sit around and chit-chat. And

25 as soon as he was done with the audit, he was out of

1     there.   He went back to Nashville.

2                     Q     Well, Mr. Berge, he was at your house in  
3     late September and early October of 2012, wasn't he?

4                     A     I think so.

5                     Q     And he was at your house in late October  
6     when you prepared the October 30 client clarification letter  
7     together, wasn't it?

8                     A     He was probably doing audit work.  
9     October is when we do the third quarter report, audit.

10                    Q     So he wasn't away in Nashville at the  
11    time all of this happened in September and October, was he?

12                    A     Well, we do the audit for the third  
13    quarter beginning in October.   Now, was he there in  
14    September?   I'm not sure.

15                    Q     He was staying in your house in October?

16                    A     In October.   You said September.

17                    MR. KROG:   No other questions at this  
18    time, Your Honor.

19                    THE COURT:   Any questions?

20                    MR. LEFKOVITZ:   No questions, Your Honor.

21                    THE COURT:   All right, you can step down,  
22    sir.

23                    THE WITNESS:   Thank you.

24                    THE COURT:   Any other witnesses?

25                    MR. KROG:   We're going to call

1 Ms. Charles, Your Honor. Do we want to do that or do we want  
2 to eat lunch?

3 MR. LEFKOVITZ: It's up to the Court,  
4 Your Honor. We can keep plowing on.

5 THE COURT: Let's keep plowing on.

6 MR. KROG: I've been informed that my  
7 client would like at least a short break, five minutes for  
8 people to go to the restroom.

9 THE COURT: Okay, five minutes.

10 (Brief recess)

11 THE COURT: Yes, sir.

12 MR. KROG: The Plaintiff calls Paula  
13 Charles.

14 (Witness sworn)

15 CLERK: State your full name, please.

16 THE WITNESS: Paula Ann Charles.

17 THEREUPON came

18 P A U L A A N N C H A R L E S

19 who, having been first duly sworn according to law, testified  
20 as follows:

21 **DIRECT EXAMINATION**

22 BY MR. KROG:

23 Q Where is it you live, Ms. Charles?

24 A Brentwood, Tennessee.

25 Q Where is it that you are employed?

1 A I am the President of MarketGraphics.

2 Q MarketGraphics Research Group, the  
3 Plaintiff?

4 A Yes, sir.

5 Q Were you the President of MarketGraphics  
6 in 2012?

7 A Yes, sir.

8 Q Have you been the President continuously  
9 since then?

10 A Yes, sir.

11 Q If you could briefly describe the  
12 business in which MarketGraphics is engaged.

13 A To scale it down for ease of explaining  
14 here, MarketGraphics is a new home market research company  
15 that collects specific data that is then processed in the  
16 Nashville/Franklin office that produces a variety of charts  
17 and graphs, but more importantly, information in such a way  
18 that banks, builders, developers, utility companies, a  
19 variety of people that are in the new home industry can use  
20 the data to determine whether there is over-building, under-  
21 building and a variety of other things.

22 Q And does MarketGraphics study the housing  
23 market in Memphis?

24 A Yes, they do.

25 Q And the surrounding counties?



1 A Yes.

2 Q And does MarketGraphics put out a report  
3 about Memphis?

4 A Yes, they do.

5 Q Is Exhibit 51, Ms. Charles, which should  
6 be there in the box with you, is Exhibit 51 and example of  
7 the report that MarketGraphics produces concerning Memphis?

8 A Yes, sir.

9 MR. KROG: Your Honor, I'd like to move  
10 Exhibit 51 -

11 MR. LEFKOVITZ: No objection.

12 THE COURT: It will be admitted.

13 (Exhibit 51 admitted)

14 BY MR. KROG:

15 Q Does MarketGraphics collect the data on  
16 every housing market itself?

17 A Can you ask that question again, please?

18 Q Sure. Does MarketGraphics enter what are  
19 called associate relationships for some markets?

20 A Some of our MarketGraphics cities, yes,  
21 have a licensed associate, while others are what I would say  
22 managed out of our corporate office in Franklin.

23 Q For the markets that you manage, out of  
24 your corporate office, who handles the client relationships  
25 in those offices for those markets?

1                   A     When it is time to do the client  
2 presentations, typically that takes place in the client's  
3 offices. That's done by Edsel Charles.

4                   Q     And clients of MarketGraphics directly,  
5 right?

6                   A     That's correct.

7                   Q     Who gets the check if there's an  
8 associate?

9                   A     The associate.

10                  Q     And what is the financial relationship  
11 between MarketGraphics and the associate?

12                  A     Generally speaking, when a person becomes  
13 a licensed associate there is an initial licensing fee. That  
14 fee then comes back to, starting about the second year of the  
15 agreement, and then additionally the associate pays for the  
16 production of the report, the copying, shipping, so forth.  
17 Additionally, one other item is that they pay for the  
18 computer processing of the data. And there are a few other  
19 ancillary things.

20                  Q     If you would look in the binder that is  
21 there in the witness box that should be marked Two, and if  
22 you'll turn to Tab 30. And as we discovered earlier, that  
23 binder is missing some tabs, but behind Tab 30 - between Tab  
24 30 and 36, are there a number of maps?

25                  A     Yes, sir.

1 Q And looking through these maps, are those  
2 maps that were printed in the MarketGraphics report for the  
3 Memphis area?

4 A Yes.

5 Q And if you turn to the end of that set of  
6 maps, are those some of the maps that appeared in the March  
7 2012 edition for Memphis?

8 A Volume 33 that is correct. I think some  
9 of these have come out of the binder.

10 Q Well, Ms. Charles, aren't the last 10  
11 maps or so marked Volume 42, March 2012?

12 A The volume number is (inaudible).

13 MR. KROG: Your Honor, we'd like to move  
14 Exhibit 35 into evidence.

15 MR. LEFKOVITZ: No objection.

16 THE COURT: Be admitted.

17 (Exhibit 35 admitted)

18 BY MR. KROG:

19 Q And Ms. Charles, the maps we have here  
20 between Exhibits 30 and 35 are just the March maps, but were  
21 the maps that were published in the other two reports every  
22 year substantially identical?

23 A Yes.

24 Q The location of the subdivisions and the  
25 subdivision data would change?

1                   A     Yes and the volume number.  Primarily,  
2     those are the only things.

3                   Q     Between 2007 and 2012, all of the maps  
4     that you produced in the Memphis reports had the copyright  
5     legend that we see in the bottom right-hand corner of each of  
6     these maps.

7                   A     Yes, sir.

8                   Q     (Inaudible) the clients and the goodwill  
9     associated with the MarketGraphics business, market area  
10    where there is an associate?

11                  A     While the associate is operating under  
12    the terms of the license agreement, they have the  
13    relationship with the client.  However, the license agreement  
14    states that should the agreement terminate, for whatever  
15    reason, there's a number of reasons, that those clients  
16    become MarketGraphics clients out of the corporate office and  
17    then we would service them.

18                  Q     So, an associate does not have the right  
19    under an associate agreement to terminate his agreement and  
20    compete with MarketGraphics?

21                  A     Absolutely not.

22                  Q     Do they have the right to use  
23    MarketGraphics intellectual property without MarketGraphics'  
24    authorization?

25                  A     No, sir.



1                   Q     Did MarketGraphics ever tell Mr. Donald  
2 Berge that he could not sell his MarketGraphics of Memphis  
3 business?

4                   A     No, sir.

5                   Q     Did MarketGraphics tell Mr. Berge that he  
6 simply could not sell it unilaterally?

7                   A     He needed to have -

8                   MR. LEFKOVITZ:  Objection, Your Honor.  
9 We need to make sure we define which Mr. Berge.

10                  THE COURT:  Okay.  Go back.

11 BY MR. KROG:

12                  Q     MarketGraphics had an associate agreement  
13 with Mr. Donald Berge, correct?

14                  A     That is correct.

15                  Q     And MarketGraphics never told Mr. Donald  
16 Berge that he could not under any circumstances sell his  
17 MarketGraphics of Memphis business, correct?

18                  A     That is correct.

19                  Q     They simply told Mr. Donald Berge that he  
20 couldn't sell it without MarketGraphics' consent; is that  
21 correct?

22                  A     That is correct.

23                  Q     Have you seen, Ms. Charles, the Realysis  
24 of Memphis report that is there in the box and marked Exhibit  
25 51?

1 A Yes, sir, I have.

2 Q In your experience, would a Memphis  
3 client, Consumer Market Research Services, under ordinary  
4 circumstances, get both the Realysis report that is marked as  
5 Exhibit 51 and the MarketGraphics report that is marked as  
6 Exhibit 52?

7 A No, sir.

8 Q If you'll turn in Binder Two, Ms.  
9 Charles, to Tab 39. Is this the email we've heard referenced  
10 several times that Donald Berge sent to MarketGraphics on  
11 September 28, 2012?

12 A Yes, sir. At 10 to 5:00.

13 Q You heard Mr. Donald Berge testify a few  
14 minutes ago that the market was audited in October, did you  
15 not?

16 A Yes, I did.

17 Q Was MarketGraphics' audit done in  
18 October?

19 A Yes, sir; the data was due approximately  
20 seven days after the retirement notice came. So, we had to  
21 scramble to be prepared to go down there and audit. And  
22 being that we audited other markets, we just needed the  
23 material to do so.

24 Q Is it my understanding from your  
25 testimony that Mr. Donald Berge didn't send you the data

1 for that fall audit report, did he?

2 A We ended up getting a portion of the  
3 data. There was a portion that we never received.

4 MR. KROG: Your Honor, I'd like to move  
5 Exhibit 39 into evidence.

6 MR. LEFKOVITZ: No objection.

7 THE COURT: Be admitted.

8 (Exhibit 39 admitted)

9 BY MR. KROG:

10 Q Did MarketGraphics agree to the  
11 termination of the associates agreement that Donald Berge  
12 requested in Exhibit 39?

13 A Yes, we did agree.

14 Q If you'll turn to Tab 41, Ms. Charles.  
15 Is Exhibit 41 an email that you sent?

16 A Yes, it is an email that I sent.

17 Q To Mr. Donald Berge on October 1, 2012?

18 A Yes, sir.

19 Q Was the attachment to that email Exhibit  
20 42?

21 A Yes, I believe so.

22 MR. KROG: Your Honor, I'd like to move  
23 Exhibits 41 and 42.

24 MR. LEFKOVITZ: No objection.

25 THE COURT: They'll be admitted.

1 (Exhibits 41 and 42 admitted)

2 BY MR. KROG:

3 Q And on the second page of this October 1,  
4 2012 letter, Ms. Charles, did you and Mr. Edsel Charles  
5 expressly remind Mr. Donald Berge about the non-compete  
6 provision in the associate agreement?

7 A Yes, sir.

8 Q Over the course of October 1 and 2 and 3,  
9 did you and other employees at MarketGraphics exchange other  
10 emails with Mr. Berge?

11 A Yes.

12 MR. LEFKOVITZ: Again, Your Honor, let us  
13 reflect that they're referencing Mr. Don Berge.

14 THE COURT: Right.

15 BY MR. KROG:

16 Q Those were emails with Mr. Donald Berge.

17 A Correct.

18 Q If you look at Exhibits 43, 44, 45, 46  
19 and 47, are those emails that MarketGraphics and Mr. Donald  
20 Berge exchanged during this period?

21 A Yes.

22 MR. KROG: Your Honor, I'd like to move  
23 Exhibits -

24 MR. LEFKOVITZ: No objection to all of  
25 those.



1 MR. KROG: 43 through 47.

2 THE COURT: They'll be admitted.

3 (Exhibits 43 through 47 admitted)

4 BY MR. KROG:

5 Q In any of those communications, Ms.

6 Charles, did Mr. Donald Berge inform MarketGraphics that he  
7 was going to continue operating a market research business?

8 A No, he did not.

9 Q Or continue working with a market  
10 research business?

11 THE COURT: It sounds like he's having a  
12 short there, can you hear?

13 MR. LEFKOVITZ: I'm hearing a background  
14 hum.

15 MR. KROG: I think the doc cam, Your  
16 Honor. I think the doc cam is trying to focus, I believe,  
17 Your Honor.

18 BY MR. KROG:

19 Q Ms. Charles, Mr. Donald Berge never  
20 informed you in any of the communications you exchanged with  
21 him between October 1 and October 3 that he was going to  
22 continue working with a market research business in Memphis,  
23 did he?

24 A He did not.

25 THE COURT: Ma'am, did you have

1 a conversation prior to the lawsuit with David Berge?

2 THE WITNESS: Yes.

3 THE COURT: Okay, go ahead.

4 BY MR. KROG:

5 Q What kind of conversations did you have  
6 prior to the lawsuit with Mr. David Berge?

7 A He attended what we call a MarketGraphics  
8 Associates Summit. That's one that comes to mind. And what  
9 that is is a meeting for all of our licensed associates and  
10 those, some of those out of the corporate office, to meet.  
11 And we would meet at a variety of places in the U.S. and  
12 discuss the details of MarketGraphics and maybe new products  
13 that we were coming out with or a new way of evaluating the  
14 data that we might put in the reports, and a lot of other  
15 internal information.

16 Q Did MarketGraphics place Mr. David Berge  
17 on its associate communication email list?

18 A Yes.

19 Q Do you recall when MarketGraphics placed  
20 Mr. David Berge on that list?

21 A I don't remember. I'm just going to  
22 guess 2005, 2006.

23 Q Before 2010?

24 A Absolutely.

25 Q If you would look, Ms. Charles,

1 at Exhibit 48, can you identify Exhibit 48 for us?

2 A Yes, it's a letter that we sent to all  
3 the MarketGraphics Memphis clients that explained that Don  
4 was retiring. And while we did that we also took the  
5 opportunity to explain that we had changed the format of our  
6 reports to a spiral bound. We also offered additional  
7 mapping products for them, so we detailed that there.

8 Q Did anything Mr. Donald Berge had  
9 communicated to MarketGraphics before 2012 give  
10 MarketGraphics the impression that Mr. Donald Berge had not  
11 retired?

12 A Can you ask that again, please?

13 Q Did Mr. Donald Berge tell MarketGraphics  
14 prior to the time this letter was sent that he was retiring?

15 A No, this was the first time I'd heard he  
16 was retiring.

17 MR. KROG: Your Honor, we would move  
18 Exhibit 48 into evidence.

19 MR. LEFKOVITZ: No objection.

20 THE COURT: It will be admitted.

21 (Exhibit 48 admitted)

22 BY MR. KROG:

23 Q Ms. Charles, if you would please look at  
24 Exhibit 49. Can you identify Exhibit 49 for us?

25 A Yes. What transpired after

1 the retirement notice and us scrambling to make sure we had  
2 the market data available in time for the clients, it came to  
3 our attention that, while talking to the clients and trying  
4 to explain the transition, that, in fact, Don wasn't retiring  
5 and that the business was continuing under a different name.  
6 So, in this letter we stated parts of our associate  
7 agreement, reminding him of confidentiality, copyright and so  
8 forth.

9 Q And one of the parts that you were  
10 reminding him of was the part that we see credited on the  
11 second page, isn't it, that you had a non-compete agreement  
12 with him, correct?

13 A Absolutely.

14 Q Did you receive an answer, Ms. Charles,  
15 to Exhibit 49?

16 A Yes, we did.

17 MR. KROG: I'd like to move Exhibit 49  
18 into evidence, Your Honor.

19 THE COURT: It will be admitted.

20 (Exhibit 49 admitted)

21 BY MR. KROG:

22 Q Is the answer you received, Ms. Charles,  
23 what we've marked as Exhibit 50?

24 A Yes, sir.

25 MR. KROG: I'd like to move Exhibit 50 -



1 MR. LEFKOVITZ: No objection.

2 THE COURT: Be admitted.

3 (Exhibit 50 admitted)

4 BY MR. KROG:

5 Q And the letter that is the second page of  
6 Exhibit 50, Ms. Charles, was attached to the email that is  
7 the first page?

8 A Yes, sir.

9 Q Does Mr. Donald Berge make any reference  
10 in here to carrying on business as Realysis of Memphis?

11 A A quick glance here I would say no but  
12 I'd have to read all of the lines of it to answer that  
13 thoroughly.

14 Q Just take the time to read it, Ms.  
15 Charles, and tell me whether or not Mr. Donald Berge  
16 communicated by this letter that he was working with a  
17 business that was continuing to sell market research services  
18 in Memphis.

19 A No, it does not say he has a continuing  
20 research company but now after all that's happened I guess we  
21 could have read into the last points where it says his  
22 clients he would not share what the financial dealings were  
23 but at the time it didn't seem to be clear.

24 Q In fact, MarketGraphics needed to know  
25 the financial arrangements that Mr. Donald Berge had, what

1 MarketGraphics of Memphis had, so that it knew what to charge  
2 the clients in Memphis, right?

3 A Yes, we wanted to honor the same price.

4 Q Did Donald Berge send you those?

5 A No, he did not.

6 Q If you'll look at Exhibit 70, Ms.

7 Charles. Is this a document that MarketGraphics received in  
8 the fall of 2012?

9 A Yes.

10 Q Was this document one of the first  
11 confirmations that MarketGraphics had that Reanalysis of  
12 Memphis was providing market research services to Memphis  
13 area clients?

14 A I don't remember if this invoice came  
15 before the phone conversations that we were having with the  
16 clients, or in the middle of that. It all happened at the  
17 same time.

18 MR. KROG: I'd like to move Exhibit 70 -

19 MR. LEFKOVITZ: No objection.

20 THE COURT: It will be admitted.

21 (Exhibit 70 admitted)

22 BY MR. KROG:

23 Q Is Exhibit 71, Ms. Charles, a similar  
24 document?

25 A Yes, that would be the invoice that

1 would have come from our office.

2 MR. KROG: I'd like to move Exhibit 71  
3 into evidence, Your Honor.

4 MR. LEFKOVITZ: No objections.

5 THE COURT: Be admitted.

6 (Exhibit 71 admitted)

7 BY MR. KROG:

8 Q Ms. Charles, if I wanted to find out what  
9 injury to Realysis Memphis enterprise inflicted on  
10 MarketGraphics, where would I look to find that out?

11 A I would calculate it and put it on a  
12 different legal document between the court systems.

13 MR. LEFKOVITZ: Your Honor, I would  
14 object to that. There's already been an entry of a judgment  
15 from the District Court, so there's been a determination of  
16 the amount of damages.

17 THE COURT: The injury, yes. A  
18 determination of the amount of the injury; whether or not  
19 that still qualifies as anything against Mr. David, I don't  
20 know.

21 MR. LEFKOVITZ: I don't know. I just  
22 bring it up that they have a judgment in the District Court  
23 and they filed a proof of claim.

24 THE COURT: Well, it's a judgment against  
25 David in the District Court and I would think that would

1 be the amount of the injury that the Court found.

2 MR. LEFKOVITZ: That's correct, Your  
3 Honor.

4 THE COURT: Is that correct?

5 MR. KROG: That is what I was going to  
6 ask the witness to testify to, Your Honor.

7 THE COURT: We don't even need to go  
8 there. Just District Court found there was this much injury  
9 done to MarketGraphics.

10 MR. KROG: No other questions at this  
11 time, Your Honor.

12 THE COURT: Mr. Lefkovitz?

13 MR. LEFKOVITZ: Thank you, Your Honor.  
14 I have two questions, maybe one-and-a-half.

15 **CROSS-EXAMINATION**

16 BY MR. LEFKOVITZ:

17 Q In response to Judge Harrison's question  
18 earlier about your conversations with Mr. David Berge, you  
19 said that those were at the MarketGraphics Summit. How often  
20 are those held?

21 A Every year.

22 Q Do you recall -

23 A Before the recession. When the recession  
24 hit we didn't do them.

25 Q So, would you say the last one was

1 in 2008, 2009 - do you recall when this last -

2 A I couldn't with any accuracy.

3 Q But it would be a period before the  
4 lawsuit? These were annual events.

5 A It was before the lawsuit.

6 Q And before Don Berge terminated his  
7 relationship with you all?

8 A Yes, it was before.

9 MR. LEFKOVITZ: Thank you.

10 THE COURT: Anything else?

11 **REDIRECT EXAMINATION**

12 BY MR. KROG:

13 Q The summits, Ms. Charles, that Mr.  
14 Lefkovitz just asked you about, those concerned  
15 MarketGraphics market and research business, correct?

16 A Correct.

17 Q And that business was the business that  
18 Mr. Donald Berge was engaged in by an associate agreement  
19 with MarketGraphics of Memphis, correct?

20 A That is correct.

21 Q And that's, essentially, the same  
22 business that Realysis of Memphis was engaged in?

23 A Yes, sir.

24 MR. KROG: That's all.

25 MR. LEFKOVITZ: No Redirect.



1 THE COURT: You can step down then, thank  
2 you. Next witness.

3 MR. KROG: Your Honor, we are out of  
4 witnesses. We do not have any further witnesses.

5 THE COURT: All right, Mr. Lefkovitz?

6 MR. LEFKOVITZ: We stand on our proof,  
7 Your Honor.

8 THE COURT: All right. You want to make  
9 closing arguments?

10 MR. KROG: I would like to make a closing  
11 argument, yes, Your Honor.

12 THE COURT: All right. You come on up  
13 and I've got some questions for you. I'm going to let you do  
14 your argument but I want to ask a couple questions first.

15 Where in the proof that we've heard today  
16 is there any indication that David intended to cause injury  
17 to MarketGraphics?

18 MR. KROG: Well, Your Honor, David knew  
19 that his father was, that the Reanalysis of Memphis business  
20 was soliciting and serving the same clients that they had  
21 served as MarketGraphics of Memphis. He knew that they were  
22 going to try to get those same clients for Reanalysis. He  
23 knew, he testified that it wasn't likely that they were going  
24 to get both MarketGraphics and Reanalysis and he's testified  
25 that, well, what he was making depended upon how well the

1 business was doing. He made \$6000 to \$10,000 a cycle, and  
2 the better the business was, the more he made, and that they  
3 were going to go out and try to get these same clients, the  
4 clients that MarketGraphics had reserved to itself through  
5 its agreement with Mr. Donald Berge.

6 And so, while he might have had the  
7 desire, I think the Court can conclude, based on the  
8 testimony, that he desired the customers to come over to  
9 Realysis because it mean money in his pocket and it put money  
10 in his dad's pocket, in order to help his father.

11 The Court can also conclude, easily, that  
12 he knew that was substantially likely to result. And as we  
13 saw at the beginning today, intent is either desire or it's  
14 knowledge of the substantial likelihood of an outcome. And  
15 so Mr. Berge knew (inaudible) working with his dad and the  
16 efforts that they were doing that those clients were going to  
17 stay, a lot of them were going to stay with the Berges when  
18 they went to Realysis. That's how these things often go.  
19 You have the face of a business and when you leave and go to  
20 another business, the people who know you go with you.  
21 That's why non-compete exists and are enforceable. Mr. Berge  
22 knew that was substantially likely to happen.

23 And so the Court can look at that and  
24 say, well, that is willful infliction of injury because he  
25 intended under this desire or knowledge of substantial

1     certainty, those customers to leave the business to which  
2     they had been contractually reserved and to go to our  
3     business and to use our business, not the old business, not  
4     the business to which they were contractually reserved.

5                     So, I think that proof, Your Honor, goes  
6     to the intent. And it's my understanding from the beginning  
7     things Mr. Lefkovitz said, that they weren't even contesting  
8     willfulness.

9                     THE COURT: Well, they're two things,  
10    willfulness and maliciousness.

11                    MR. KROG: Very true, Your Honor, but -

12                    THE COURT: They're not the same thing in  
13    any of the cases.

14                    MR. KROG: They aren't the same thing,  
15    although the willfulness is evidence of the malice because  
16    malice is ill will or spite. What malice is, malice is  
17    simply acting with conscious disregard of the rights of  
18    others or without just cause or excuse. And Mr. David Berge  
19    testified that he consciously disregarded the fact that what  
20    they were doing would inflict injury on MarketGraphics. So,  
21    that right there is the conscious disregard. And that's a  
22    disjunctive test under malice.

23                    You can have conscious disregard or you  
24    can have without just cause or dispute, just cause or excuse.

25                    THE COURT: Well, the Geiger Case

1 says unless the actor desires to cause the consequences of  
2 his act or believes that the consequences are substantially  
3 certain to result from that.

4 MR. KROG: Correct, Your Honor. And the  
5 Markowitz Case says that's what willful means. They're using  
6 that restatement section 8A definition of intent and applying  
7 that to willful. So Markowitz and Geiger are very clear that  
8 that is what willful means. Willful means intent; intent  
9 means I desire it or I know it's substantially likely to  
10 happen. That's the willfulness of it.

11 This malice question is whether you have  
12 a just cause or excuse when you act with conscious disregard.

13 THE COURT: Well, what did he consciously  
14 disregard?

15 MR. KROG: Well, Your Honor, he  
16 consciously disregarded the risk of injury, the injury that  
17 was occurring to MarketGraphics. He said he would follow his  
18 dad and participate in his dad's business if they took one  
19 client or if they took all the clients of MarketGraphics.  
20 But the fact that it was taking money, that it was injuring  
21 MarketGraphics' business was not of a concern to him.

22 And we can go back and look, and he  
23 expressly said, I asked him, you consciously disregarded that  
24 injury to them, didn't you? He said yes.

25 THE COURT: I don't remember

1     that question being put like that.

2                     MR. KROG: I can't say that I wrote it  
3     down at the time, Your Honor, or could cite it back  
4     precisely. But we could also look at the just causes or  
5     excuses. And I haven't heard or seen in the paper a real  
6     clear articulation of what just cause or excuse the Defendant  
7     is relying on here. The main one that I heard from Mr.  
8     Berge's testimony, Mr. David Berge's testimony, is the first  
9     one we have highlighted here, that he did it for his father.  
10    And the problem, Your Honor, is that this familial loyalty  
11    justification is not a just cause or excuse. It was  
12    expressly rejected in the In re: Bammer case, Ninth Circuit  
13    Court of Appeals Case, applying actually a more rigorous  
14    maliciousness test, the one that incorporates the just cause  
15    or excuse element.

16                    And in Bammer, Bammer's mother had been  
17    convicted of embezzlement. She had ripped off hundreds of  
18    thousands of dollars from -

19                    THE COURT: Did what for Dad? What did  
20    he do that you're saying he did for dad?

21                    MR. KROG: Well, he participated in the  
22    Reanalysis of Memphis business. He kept on working with this  
23    business and he was an integral part of it. Donald Berge  
24    needed him to drive the market. He did the research, he went  
25    out and drove large parts of the market, keyed in all of the



1 data entry, 90 to 100 percent of the data entry. He let his  
2 father put out all the Realysis of Memphis stuff with his  
3 name on it, knowing at the time that his father had a non-  
4 compete agreement and that he hadn't signed it, and that they  
5 were likely to get sued over it. And his justification is,  
6 my father needed help. And I won't argue with the fact that  
7 Donald Berge needed David Berge's help to operate the  
8 Realysis of Memphis business. That's the case.

9 But his loyalty to his father was not a  
10 justification for helping his father operate in violation of  
11 his covenant against competition and coaxed customers away  
12 from MarketGraphics in the process. That defense of it was  
13 out of compassion for my parents was rejected in the Bammer  
14 Case where a son engaged in a number of fraudulent transfers  
15 to encumber his mother's assets and inflate them against a  
16 embezzlement just.

17 THE COURT: And he knew what he was  
18 doing?

19 MR. KROG: He knew what he was doing.

20 THE COURT: Now, did Donald know, given  
21 his father's testimony, about when would his father say he  
22 talked to lawyers and the non-compete was valid, was invalid.

23 MR. KROG: I believe Donald Berge  
24 testified that he had heard from bankers and other people  
25 over the years and that he hadn't actually consulted an

1 attorney specifically about this topic, or what they were  
2 going to be doing that's admissible.

3                   Mr. David Berge did testify that he knew  
4 about the non-compete, that he knew it was in there and he  
5 knew at least by the October 5 letter from MarketGraphics  
6 that MarketGraphics was going to attempt to enforce it. And  
7 the law is, if you know about contracts like that, you don't  
8 get to say, oh, well, maybe that's enforceable, maybe it's  
9 not. I'm going to say it's not and go ahead. And was  
10 essentially ignorance of the law defense and we cited several  
11 cases on that, one of which is the Wierenga Case. Mr.  
12 Wierenga had a house that was being foreclosed on and he and  
13 his wife, they went and they took most of the fixtures out of  
14 the house. Then when the bank sued them for damaging the  
15 house, taking the fixtures out, they said, oh, well, we  
16 thought we owned those things and that we could take them  
17 with us.

18                   THE Bankruptcy Court, in finding that the  
19 liability for removing those fixtures was nondischargeable,  
20 said, you know, that's an ignorance of the law defense. That  
21 doesn't work. It's not a defense civilly, it's not a defense  
22 criminally, and it's not a justification or excuse under  
23 523(A)(6). You know, you knew you were taking these things  
24 out of the house and that you were damaging the house in the  
25 process. So, the fact that you were mistaken about

1 the lawfulness, that doesn't insulate you.

2                   The same is true, Your Honor, in - the  
3 exact same thin is true in these commercial contract cases.  
4 You know there's a contract out there with a non-compete  
5 provision and you know you're doing business with a party to  
6 it, you act at your own peril.

7                   We had a case a couple of years ago  
8 across the street in front of Magistrate Judge Griffin with  
9 exactly the same facts from the tort side. And the Defendant  
10 in that case said, oh, well I knew that this guy had a non-  
11 compete and I knew I was on the list but golly gee, you know,  
12 I thought we had it set up so we weren't breaching that  
13 agreement. And, therefore, my acts weren't malicious and I'm  
14 not guilty of this tort of interfering with the contractual  
15 relations.

16                   And Magistrate Griffin, based on the  
17 great and rebutted weight of authority said, "That is not how  
18 the law works." If you know that what you're doing is taking  
19 sales, taking customers away from the other party of this  
20 agreement who has reserved those rights to himself, you don't  
21 get to simply decide, on advice or without advice of counsel,  
22 that what you're doing is okay. You act at your own risk.  
23 And that's malicious. And so we've seen that rejected here  
24 by this Bankruptcy Court. We also cite the Sark Case, Your  
25 Honor, in which Mr. Sark said, well, I had an attorney. I

1 thought my competition in this case, with my former employer,  
2 was lawful because my attorney said I could do this.

3                   The Bankruptcy Appellate Panel for the  
4 Sixth Circuit, in Sark said the great weight of authority is  
5 that arguments like that aren't a defense to maliciousness.

6                   And one of the reasons that neither  
7 family loyalty nor ignorance of law are defenses to  
8 maliciousness, they don't prevent the act from being  
9 malicious, is that the party implicated by this conduct is  
10 the Plaintiff, the creditor. And neither well, I feel  
11 compassion or I feel compelled to obey my parents nor, well,  
12 I just didn't know that was against the law, neither of those  
13 are excuses that involve the Debtor having any concern for  
14 the rights of the Creditor.

15                   There are some cases that we've seen  
16 where a party goes out and, you know, sells collateral, for  
17 instance, in violation of a security agreement, and the  
18 Debtor comes in and says, well, you know, I knew it was wrong  
19 to sell that stuff. I really thought that if I did it I  
20 could use the revenue to keep the business going and pay off  
21 the creditor. The creditor-oriented excuse. And then the  
22 justifications that Mr. Berge has been advancing here are  
23 creditor-oriented.

24                   And so for those reasons, Your Honor, we  
25 think that conduct counts. You know it counts as malicious;

1 these excuses aren't. We also have the "I wasn't involved."  
2 I did the audit, I did my thing and then I was out. And I  
3 wasn't driving the bus; I wasn't driving the wagon. That's  
4 also a defense that has been rejected. I mean it leans more  
5 to willfulness but the Bankruptcy Courts have been very clear  
6 that if you have knowledge of the enterprise and you have  
7 knowledge that the enterprise is inflicting an injury on  
8 someone else, you don't have to be in charge. You just have  
9 to participate.

10 And so we have the Draiman Case in which  
11 the principal mover in the unfair competitive scheme was the  
12 debtor's husband. You were involved, you were a member of a  
13 conspiracy, you acted in concert with your husband, and so  
14 his misconduct is imputable to you. Not just for purposes of  
15 tort liability but for purposes under 523(A)(6). And that's  
16 one of the reasons, Your Honor, why we've looked a lot today  
17 at what Mr. Donald Berge did, because Mr. David Berge was  
18 involved in that undertaking, he was involved in that  
19 undertaking, he was involved in the business, he knew how it  
20 was being operated, and in District Court, we look at that  
21 Court's judgment. The District Court found that Mr. Berge,  
22 David Berge, had been acting, in Judge Trauger's words, "in  
23 active concert with Donald Berge."

24 (Away from microphone) the Defendant  
25 David Berge and the LLC have been acting in (inaudible)



1 active concert with Donald Berge since Donald Berge's  
2 termination of the associate agreement. The actions of the  
3 (inaudible).

4 Frankly, Your Honor, the case law is  
5 starker than the language Judge Trauger uses because there  
6 are a number of cases where much less than acts in concert  
7 suffices to hold the subordinate member of the wrongful  
8 undertaking liable for the undertaking's debts.

9 There are a number of cases cited, Your  
10 Honor, including the 11<sup>th</sup> Circuit 2012 case, in re: Jennings,  
11 Maxfield versus Jennings, where the tortfeasor's ex-wife  
12 executed a deed to a piece of property because the tortfeasor  
13 asked her to, and it was a fraudulent transfer. And the 11<sup>th</sup>  
14 Circuit says, well, because you knew that there was no good  
15 reason to make that conveyance, and you knew there was this  
16 creditor over here who was getting stiffed, you're on the  
17 hook, under 523(A)(6) for participating in the scheme, even  
18 though you weren't the original tortfeasor and you're not the  
19 prime mover or player in this undertaking.

20 Iwas (phonetic) versus Cunningham 2012  
21 6<sup>th</sup> Circuit Bankruptcy Appellate Panel case is similar. The  
22 Cunninghams were a married couple. Mrs. Cunningham embezzled  
23 hundreds of thousands of dollars from her employer, which Mr.  
24 Cunningham withdrew from the bank and spent. And Mr.  
25 Cunningham, when he was sued for nondischargeability in

1 Bankruptcy, said my wife is the embezzler. How was I  
2 supposed to know where the money came from? You know, it was  
3 a little heavy on the pockets. And the Bankruptcy, Appellate  
4 Court, said, again, that is not how this works. You knew  
5 from your knowledge of your family's finances that this money  
6 didn't come from a paycheck, either for yourself or your  
7 wife. You knew you had way more cash in the bank than you  
8 earned, and you took it out and dissipated it. And that's  
9 malicious injury under 523(A)(6).

10                   There was also some talk in Mr. Berge's  
11 trial brief and some reference in testimony to the idea that  
12 perhaps Mr. Warlick didn't do a good job. The problem there,  
13 Your Honor, is two-fold. One, Mr. Warlick wasn't involved  
14 until after they had already started all this. And so the  
15 intent that they formed in October in carrying through the  
16 Realysis business was not something Mr. Warlick had any  
17 involvement at all. The record will reflect that the  
18 associate agreement was terminated on September 28, 2012,  
19 that Realysis of Memphis was already putting out its hook for  
20 it by that time. They were invoicing clients on September  
21 24. The exchange of letters between MarketGraphics and Mr.  
22 Donald Berge, of which Mr. David Berge had knowledge, was in  
23 the first week of October and they don't hire Mr. Warlick  
24 until sometime after MarketGraphics filed suit against them  
25 on January 2, 2013.

1                   And the problem, to the extent that this  
2 could be a defense at all, is that it just isn't. The Court  
3 in the Couch Case, Bankruptcy Court, said that Couch is  
4 accountable for the acts and omissions of his counsel, even  
5 if Couch might have reason to blame counsel.

6                   So, even if we were to posit and admit  
7 that, you know, Mr. Warlick did a bunch of stuff wrong, and  
8 even if it were relevant, it's not a defense here because it  
9 doesn't go to whether or not Mr. David Berge acted without  
10 just cause or excuse, and the things that he did in the  
11 District Court action, if those were wrong that's between Mr.  
12 Warlick and Mr. Berge. Mr. Berge is stuck with it.

13                  Your Honor, Mr. Lefkovitz asked Mr. David  
14 Berge if he would have done all this if his father had told  
15 him that it was unlawful and that they were going to be  
16 stopped. Mr. Berge said, "No." Those were the only two  
17 questions Mr. Lefkovitz asked Mr. Berge. And, again, that's  
18 a mistake of law, Your Honor. People can make mistakes of  
19 law and be prosecuted and sent up the river for a long time  
20 for doing something you didn't know was illegal. And the  
21 Bankruptcy Courts agree in the 523(A)(6) context. We  
22 mentioned the Weirenger Case, the Deportis Case from the  
23 Southern District of Illinois, we cited in our brief.  
24 (Inaudible) the In re: Glenn Case in 2012, very similar facts  
25 to Weirenger.

1                   We also saw, Your Honor, that Mr. Berge  
2 was very aware of the maps that he used to drive the market  
3 for MarketGraphics. And if we look at the exhibits, Your  
4 Honor, that were admitted and stipulated, one of the  
5 principal copyright violations, Your Honor, was that several  
6 of those maps had been copied over into the Reanalysis report,  
7 the areas were almost or substantially identical in the words  
8 of the copyright law. And the District Court found that Mr.  
9 Berge's infringement in that regard was willful. And we  
10 submit, Your Honor, that the willfulness determination by the  
11 District Court is preclusive on the willfulness prong here  
12 because, as we discussed in the 6<sup>th</sup> Circuit case, the  
13 Princeton University Press case, willfulness in the copyright  
14 act means intent to infringe, not just intent to copy but  
15 intent to infringe, knowledge that the copying constitutes  
16 infringement.

17                   And so the District Court has already  
18 determined that Mr. Berge intended to infringe, he knew the  
19 copyright, he knew those maps were copyrighted by  
20 MarketGraphics and he was culpable for his involvement in  
21 infringing them with the Reanalysis reports, knowing that the  
22 copying was infringement.

23                   And even if that weren't preclusively  
24 established, Your Honor, we submit that the Court could  
25 easily conclude that Mr. David Berge knew the maps were

1 copyrighted because he started at them for hours at a time,  
2 days at a time, for years, driving the car. He couldn't deny  
3 that at some point over that time he'd seen the copyright  
4 notices and that he knew it was copyrighted. He didn't have  
5 a specific recollection of having seen the copyright notices  
6 but I think Your Honor would be well-justified in concluding  
7 that if you stare at the maps hours at a time, eight to 12  
8 hours a day for three weeks at a time, that at some point  
9 you're going to notice everything that's on them.

10                   There was also in this case, Your Honor,  
11 an open question regarding the extent of the preclusion  
12 flowing from the District Court's judgment, something Your  
13 Honor didn't rule upon in the summary judgment stage, as to  
14 whether or not the District Court judgment decided the common  
15 law claims that MarketGraphics had asserted against Mr. David  
16 Berge.

17                   Mr. Berge has asserted that because the  
18 judgment doesn't refer to those claims expressly, and  
19 expressly say judgment is hereby entered for MarketGraphics  
20 on the account of intention interference with business  
21 relations that those claims were not decided by the judgment.  
22 And that's simply not the case, Your Honor.

23                   So, we cited a very stark articulation of  
24 the rule of the interpretation of judgments in preclusion  
25 cases. There was a case a few years ago out of Fifth Circuit



1 actually, Miller versus Nichols, where somebody made the same  
2 argument. Well, that's not mentioned (inaudible) in the  
3 judgment, so it wasn't decided. And Miller versus Nichols  
4 says that is not the law. The exact quote, "That is not the  
5 law."

6 And the Sixth Circuit has told courts,  
7 Bankruptcy Courts, that when you have this preclusion  
8 question you have to look at the record as a whole. And one  
9 of the things we have in the record from the District Court  
10 case, we've introduced here, Your Honor, is our local rule  
11 7.01. And if Your Honor (inaudible) the exhibits that have  
12 been introduced from the District Court record, you'll see  
13 that there was a motion for summary judgment filed. There  
14 was then a - there was no response filed. It was a motion to  
15 continue, a motion to (inaudible) time to respond. There was  
16 no response filed to the motion for summary judgment. And  
17 after the response deadline passed, we filed this local rule  
18 7.01 (inaudible). And local rule 7.01 across the street,  
19 Your Honor, of course, is the rule that says you don't oppose  
20 a motion that's consented to and it will be granted.

21 And in this motion, Your Honor, we ask  
22 the Court precisely what we were hoping it would do in its  
23 summary judgment ruling. And so on the second page is a very  
24 nice little chart saying that the Plaintiff requests  
25 (inaudible) against all the Defendants in the following

1 amounts, and we reference the various counts. And these were  
2 the counts that remain pending against Mr. David Berge at the  
3 time of this motion, the time of the summary judgment motion,  
4 the local rule 7.01 motion. And six, 11 and 12 were the  
5 claims for the common law claims. And Count 10 is the TCA  
6 claim. And those are all on the one line with the \$72,328  
7 because the damages were (inaudible). They weren't  
8 independent damages. They replicated one another. And also  
9 because (inaudible) entitles you to treble damages if the  
10 violations are willful, and the District Court found it was.  
11 And so the additional amount from the trebling is there on a  
12 second line.

13                   When we look at the judgment, Your Honor,  
14 we see the same (inaudible). Instead of being referenced by  
15 counts, it's referenced by the type of damages. And there is  
16 the first line, just like it was in the 7.01, is copyright  
17 damages, and then there were all the other compensatory  
18 damages. And then the third line is these treble damages but  
19 those aren't compensatory, that's a punitive amount. And  
20 then prejudgment interest. And when we filed the form of the  
21 judgment, we left that last line (inaudible) interest after  
22 August 5, we left that blank because we didn't know how long  
23 Judge Trauger would take to enter the judgment, and she took  
24 a few days and her office entered the number, \$336.94.

25                   And just for good measure, we had

1 a second a chart on that local rule 7.01 measure attached to  
2 the end that broke it down once again for Judge Trauger, with  
3 both the account name and the account numbers. And we see,  
4 again, the accounts, the compensatory damages for the common  
5 law claims and the compensatory element of the TCA are lumped  
6 in here under the same 72,328 number. That was the way we  
7 presented that throughout the papers to make it clear to the  
8 District Court that we were requesting that number once, that  
9 we weren't entitled to get 72,328 times all those claims, but  
10 those damages were (inaudible) that yielded the same damages.  
11 And so, Your Honor, when Judge Trauger entered her judgment  
12 that has a very similar table, she's, you know, replicating  
13 carrying over that request that she is granting to enter a  
14 judgment on all these other compensatory claims in this  
15 72,328 amount.

16 And she actually goes on later in the  
17 judgment to talk about things and facts that don't relate  
18 either to the copyright claim or the TCA claim.

19 If we look at Paragraph 8, we have  
20 Paragraphs 8 and 9, Your Honor, and we see that the  
21 Defendants against whom the judgment is being entered are  
22 enjoined from acting in concert or (inaudible) with or on  
23 behalf of Donald Berge and doing certain things related to  
24 market research in the Memphis Metro area. And those,  
25 obviously, Your Honor, are injunctive instructions related to

1 the unfair competition, the conspiracy and the interference  
2 with business relations elements of our claims. This is not  
3 TCPA relief and it's not related to the copyright claim that  
4 was asserted because of a separate multi-phase (inaudible)  
5 injunction against the infringement that we scrolled through  
6 before. In other words, that's not in dispute but that's in  
7 there.

8                   And then there's this other equitable  
9 relief related to the common law claims. We looked at  
10 Paragraph 3 previously, at the Defendants, including David  
11 Berge acting in concert with Donald Berge since Donald  
12 Berge's termination of the associate agreement. That's  
13 clearly a finding related to unfair competition and the  
14 conspiracy claims.

15                   And, again, in Paragraph 4, that they  
16 wrongfully impaired Plaintiff's goodwill among its customers  
17 and deprived it of the opportunity to compete fairly. That's  
18 not copyright act relief, Your Honor, that is common law  
19 relief related to the common law claims that we had. And the  
20 same is true under Paragraph 12, related to trademark issue  
21 that wasn't even being asserted directly against Mr. David  
22 Berge because the registrant of the infringing website that  
23 we need to talk about here today. That was Donald Berge and  
24 that claim was asserted as discussed in the local rule 7.01  
25 motion and motion for summary judgment that was asserted

1 against Mr. Donald Berge. But Judge Trauger finds that they  
2 benefited from that infringement of trademark and  
3 participated in it.

4 Again, Your Honor, that's unfair  
5 competition and that's conspiracy. It's not copyright  
6 infringement and it's not (inaudible) relief.

7 Finally, Your Honor, the judgment can't  
8 be related solely to the copyright claim and the TCA claim  
9 because Judge Trauger certified the judgment as final under  
10 Rule 54(B). And the record is clear and it's stipulated that  
11 there were other claims still pending against Mr. David Berge  
12 when the judgment was entered. There were other parties,  
13 Martha Berge and Donald Berge, as to whom no judgment at all  
14 was entered at that time. The case was stayed as to them.  
15 They'd already filed Bankruptcy.

16 So, in order for Judge Trauger to certify  
17 the judgment as final under Rule 54(B), she had to resolve  
18 the whole case against Mr. David Berge. She had to resolve  
19 all the claims. Now, we've abandoned a couple of those  
20 claims; those claims go away. And other claims she entered  
21 judgment in the Plaintiff's favor, as it had been requested  
22 in summary judgment motion that she granted and in the local  
23 rule 7.01 motion, pursuant to which she entered the judgment.  
24 She couldn't have left those claims hanging, they had to go  
25 somewhere. There is nothing in the judgment that



1 suggests they've been dismissed.

2                   Mr. Lefkovitz has never provided any  
3 authority for the proposition that Judge Trauger could simply  
4 leave them in limbo. And the case law is very clear that if  
5 you've got a Rule 54(B) judgment it has to adjudicate all the  
6 claims against at least one defendant, the defendant against  
7 whom the judgment is being entered. All the claims as to at  
8 least one party or one claim as to all parties. And it  
9 clearly adjudicates any claim as to all the parties because  
10 Donald Berge and Martha Berge were stayed. The Judgment  
11 expressly (inaudible) doesn't operate against them because of  
12 the stay. They have admitted, Your Honor, David Berge  
13 admitted on multiple occasions in this case, and it's  
14 stipulated to and admitted in his answer, that this was a  
15 final judgment against him. If it was final, it had to lose  
16 all the claims that were pending against him at the time it  
17 was entered.

18                   So, we think for that reason, Your Honor,  
19 the Judgment does resolve our common law claims. Those  
20 claims, the necessary elements of those claims, are entitled  
21 to preclusive effect and under the case law those claims  
22 which include the intentional interference with business  
23 relations and civil conspiracy -

24                   THE COURT: Even though she didn't talk  
25 about them.

1 MR. KROG: She didn't talk about them  
2 specifically but the parts of the judgment that clearly don't  
3 relate to the claims she mentioned by name relate to them.  
4 And the record reflects that they were live and the judgment  
5 is granting the motion for summary judgment. You know, the  
6 claims had to go somewhere and she didn't dismiss them.  
7 You know, and if she had simply put down  
8 a one-line order, if we hadn't been asking for injunctive  
9 relief, she'd just have put down a one-line order,  
10 Plaintiff's motion for summary judgment is granted and the  
11 clerk is directed to enter judgment according to Rule 58. I  
12 mean that would have had the same effect. It would have  
13 adjudicated it in MarketGraphics' favor, all the claims for  
14 relief had been sought, and motion for summary judgment. And  
15 the basic irreducible elements of Defendant's common law  
16 claims, Your Honor, intentional interference with business  
17 relations and civil conspiracy would add any icing on the top  
18 or additional findings because the (inaudible) because  
19 intentional torts under Tennessee law entitle the Plaintiff  
20 to judgment as a matter of law under 523(A)(6). In regards  
21 to at least the portion of the judgment that reflects damages  
22 on them. So the 72,328 element.

23 And we cited the case law in our  
24 (inaudible), Your Honor, from the Trawmad Case, a Tennessee  
25 Supreme Court case, on the element of the intentional

1 infliction, intentional interference with business relations.  
2 We have cited the determinations from the Bankruptcy Court of  
3 the Eastern District of Tennessee that that's a tort that's  
4 not dischargeable under (inaudible) as well as analogous  
5 determinations of other courts.

6                   Something is true at least as to  
7 willfulness, Your Honor, for the TCA judgment. And there was  
8 some confusion, previously at least. I was confused, I doubt  
9 that Mr. Lefkovitz or Your Honor was confused. I was  
10 confused perhaps as to the scope of the Court's judgment  
11 ruling as to whether or now the TCPA judgment in Judge  
12 Trauger's ruling conclusively established willfulness for  
13 purposes like we're here today. And I would submit to Your  
14 Honor that it does and that to the extent that Your Honor  
15 will otherwise, will be inclined to otherwise - that judgment  
16 or that decision should be altered, if Your Honor should  
17 conclude that the willful violation of TCPA is the same as  
18 the willful infliction of injury. And the reason for that is  
19 that it's accepted that under the TCPA willful means  
20 intentional. And there's also this knowing standard, willful  
21 or knowing, and knowing means with knowledge of the falsehood  
22 or deceptiveness of statements you're making.

23                   And under Tennessee law, when we say  
24 intentional, we mean the same thing that the Supreme Court in  
25 Geiger means, desire the results or know they're

1 substantially likely to occur. In fact, the Court of Appeals  
2 in the Mix versus Miller case, they're adopting to the same  
3 restatement (inaudible) Section 8(A). We also cite in our  
4 brief the very recent Tennessee Supreme Court, Hughes versus  
5 Metro, in which the Tennessee Supreme Court goes through the  
6 same analysis, did this Metro employee commit an intentional  
7 tort? Did he admit negligence? And look at, well, what  
8 results did he intend? If you intended a particular sort of  
9 result, well that was an intentional tort. And if you didn't  
10 have any conception of the outcome, well that's just  
11 negligence.

12                   And so, Your Honor, the idea is that under the  
13 TCPA the willful, which we know means intentional, that  
14 doesn't count as willful 523(A)(6), Your Honor. That's not  
15 accurate. And I think that one of the reasons that argument  
16 comes up is, I'll be honest, (inaudible) Your Honor's  
17 colleague in Knoxville got it wrong in the (inaudible) case.

18                   Mr. Lefkovitz has argued that this  
19 (inaudible) case was cited in the debtor's favor, which it  
20 was, because the underlying judgment didn't demonstrate  
21 malice.

22                   I think it's probably clear from what  
23 we've got highlighted here, that the underlying judgment,  
24 willful violation of TCPA judgment didn't find that the  
25 Bankruptcy Court concluded that that didn't mean willful

1 under 523(A)(6). The state court's judgment finds that the  
2 debtor intended to commit the acts that caused harm to the  
3 plaintiffs. And the court then correctly said that is not  
4 the same as finding that the debtor intended (inaudible)  
5 harm. And the problem is that that first sentence is not the  
6 law in Tennessee. That is not what Tennessee law means by  
7 willful or intentional. When our Legislature uses that term  
8 in a TCPA, they mean you intend the consequences. And notice  
9 that (inaudible) doesn't cite any authority for this  
10 proposition, not for where it comes from.

11 THE COURT: Are you saying this case was  
12 decided wrongly by the Bankruptcy Judge?

13 MR. KROG: To the extent that it turned -  
14 I'm saying, Your Honor, that its interpretation of willful  
15 under the TCPA is wrong. In other respects, it is a very  
16 well-reasoned opinion. In this respect, apparently the -  
17 whoever was representing the creditor in this case didn't  
18 bother to give the Bankruptcy Court any insight into what  
19 willful and intentional mean in Tennessee law, because I  
20 can't explain otherwise why the Bankruptcy Judge, in an  
21 otherwise well-reasoned and scholarly opinion, would make  
22 this flagrant misstatement of Tennessee law.

23 And so, to the extent that we're relying  
24 on Crownover to conclude that the TCPA judgment isn't  
25 conclusive as to willfulness, Your Honor. I would encourage



1 Your Honor to respectfully disagree with the Bankruptcy Court  
2 from the Eastern District of Tennessee because the statement  
3 the Court makes isn't supported by Tennessee authority.

4 Your Honor, Mr. David Berge participated  
5 in this Realysis business. He knew what he was doing. He  
6 very well might have participated in it at his father's  
7 behest. Your Honor does not have to believe any of the  
8 things Mr. Don Berge said in District Court about David being  
9 in charge, it being David's business, all I do is take the  
10 mail and be the gopher. Your Honor, (inaudible). Frankly, I  
11 don't think it's true. We didn't think it was true then and  
12 I don't really think it's true now.

13 But Mr. David Berge was not simply a  
14 complete outsider who didn't know what was going on. He was  
15 staying in his parents' house in October of 2012. He saw his  
16 father send out at least one letter to his client (inaudible)  
17 in an attempt to dissuade them from continuing their  
18 relationship with MarketGraphics. He had a financial  
19 interest in that happening. He might have done it because he  
20 wanted to help his father out; he might not bear any ill will  
21 and this might have caused any ill will at that time towards  
22 MarketGraphics, but that's not the test, Your Honor.

23 The evidence, Your Honor, demonstrates  
24 his participation was just as great, if not greater, than the  
25 level of participation in wrongful undertakings in Bankruptcy

1 courts all across the country have found sufficient to be  
2 willful and malicious under Section 523(A)(6).

3                   In addition, we have here the fact that  
4 Mr. Berge, at least to a certain extent, embraced the title  
5 his father was giving him. He put it on Linked In that he  
6 would be President. He didn't object at any time during the  
7 District Court action or the pre-suit Reanalysis period to  
8 being represented in this way. He went along with the  
9 meetings with his father and the clients so that they could  
10 get to know him better and someday maybe he could take over  
11 the business. It just so happens, Your Honor, that the  
12 business wasn't one that's lawful.

13                   Under the circumstances, and the fact  
14 that Mr. Berge might have thought it was okay doesn't make it  
15 so. For that reason, Your Honor, we submit that the, request  
16 that the Court enter the request declaration that the entire  
17 amount of Plaintiff's judgment in the District Court be  
18 declared non-dischargeable under 523(A)(6) of the Bankruptcy  
19 Code and a judgment would be entered in the Plaintiff's  
20 favor, accordingly.

21                   MR. LEFKOVITZ: If Your Honor please,  
22 Steve Lefkovitz for the Defendant. At the get go I want to  
23 compliment Mr. Krog on probably one of the best prepared  
24 cases I've seen in a dischargeability trial. There have  
25 probably been thousands of them that I've tried before this

1 Court. His level of preparation has been absolutely  
2 outstanding and I want to compliment him on that.

3 Let's talk about what we have in the  
4 case. We have 523(A)(6). If you'll look at 523(A)(6), Your  
5 Honor, you want to go back 18, 19 years when Geiger came  
6 down. Geiger dealt with a doctor who was sued for medical  
7 mal and the Court said in Geiger it's not dischargeable.  
8 Then we got to Markowitz, and I think the Court is well aware  
9 that the Sixth Circuit said in Markowitz that it was the  
10 intentional acts that you had to intend your ultimate  
11 consequence.

12 Now, my final questions when I examined  
13 Mr. David Berge was had you know the non-compete was  
14 enforceable would you have gone down this road. He said  
15 absolutely not.

16 The question, and I think the proof is my  
17 father told me (inaudible). And the reason was that David  
18 believed he was on safe ground. And I don't think that is  
19 any intent to cause injury under the facts of this case.

20 When I did my pre-case workup with Mr.  
21 David Berge to start this matter, I'll tell you the fact  
22 situation. I was concerned because I had read all this stuff  
23 from the District Court and in looking at the file I thought  
24 this case was the Ledford case. I saw this as something  
25 similar to cites in Ledford that Mr. Krog was going to come

1 in and argue that it was a partnership between David and  
2 Donald, that Reanalysis was just not really an LLC, and that  
3 because of Donald's wrongful conduct that we were going to  
4 have imputed liability to David. Now, that would have been a  
5 very interesting case.

6 But we're here under 523(A)(6) and the  
7 scope of the discharge - and that case didn't get brought.  
8 Mr. Donald Berge goes to Bankruptcy Court in Mississippi,  
9 uncontested discharge. That wouldn't have been the result  
10 had I been the Bankruptcy Judge hearing the case but it  
11 wasn't contested.

12 Now we're here and Mr. Krog is saying,  
13 well, we've got all these other claims that survived the  
14 entry of the judgment. We're here under 523(A)(6). It's  
15 either willful and malicious or it's not -

16 THE COURT: Maybe you have a position on  
17 this. My question was what she ruled on on the summary  
18 judgment and he's saying she ruled on civil conspiracy and  
19 ruled on intentional interference with a business  
20 relationship. What's your position on that?

21 MR. LEFKOVITZ: I think the order speaks  
22 for itself. I think she's only found - I think Your Honor  
23 got it right in your September 30, 2014 ruling, and that was  
24 that the order of Judge Trauger speaks for itself, and it  
25 ruled what it ruled. And we can't read more into that order

1 than what was there. And if there were matters unresolved by  
2 her order that the Plaintiff's attorney prepared, then they  
3 had to be addressed today in part of the proof and raised as  
4 issues to be held non-dischargeable in the case.

5 We can't read more into the record than  
6 what Judge Trauger's ruling was, and the Court only speaks  
7 through its orders. So, the order of Judge Trauger is what  
8 it is. And if there are unresolved matters from the District  
9 Court, today was the day to bring them aboard. And we have  
10 heard no proof and they would have to be presented as proof  
11 under 523(A)(6), and it comes back down to the willful and  
12 malicious.

13 If the Court finds that the young Mr.  
14 Berge acted maliciously, which I say he did not, then they  
15 have not met the conjunctive test under both parts of the  
16 statute and the debt is discharged. And I think that it  
17 makes an interesting academic question but the scope of the  
18 discharge is the scope of the discharge. And we can't read  
19 more into Judge Trauger's order than what she ruled.

20 So, for that reason I submit that they  
21 had the (inaudible) today to find both willful and malicious,  
22 and if they didn't then the whole claim should discharge.

23 Thank you.

24 THE COURT: Anything further you want to  
25 say?



1 MR. KROG: Just one point, Your Honor -

2 THE COURT: Did you try the case at the  
3 district below? Were you there when summary judgment was  
4 granted? Just curious.

5 MR. KROG: Well, yes, Your Honor, but the  
6 District Court didn't have a hearing on the summary judgment.  
7 The Court held a hearing on the motion for preliminary  
8 injunction, which I was present. I actually heard my  
9 unpleasant voice on a record of Mr. Donald Berge's  
10 deposition, and I will admit to having drafted the summary  
11 judgment papers and the entry of judgment papers. And if I  
12 ever find myself in this position again, maybe the judgment  
13 that I (inaudible) will have a little bit more detail.

14 Our point, Your Honor, is that it doesn't  
15 matter how detailed that judgment was because (inaudible -  
16 away from mic) final as to Mr. David Berge, and the Defendant  
17 has admitted - (inaudible). The judgment is a final judgment  
18 (inaudible).

19 (Inaudible - away from mic) Mr. Berge  
20 admitted in Paragraph 31, Defendant admits the allegations  
21 contained in Paragraph 31 of the Complaint filed against  
22 (inaudible). They admitted that the judgment was final, Your  
23 Honor. And, of course, as Your Honor knows, and you can  
24 admit statements of fact and statements of law in the  
25 pleadings. And Mr. Lefkovitz has still not identified any

1 legal authority for the proposition that Judge Trauger could  
2 shuffle common law claims off into civil procedure limbo and  
3 enter a final judgment against one but not all defendants in  
4 the case.

5 THE COURT: How do we know that she  
6 didn't find it necessary to address those? I mean how do we  
7 not know that? A lot of times I'll rule on one thing and not  
8 on something else.

9 MR. KROG: Your Honor, to the extent that  
10 there are discrete claims in a case, if Your Honor -

11 THE COURT: Apparently you were happy  
12 with the final judgment. I mean I would have been in  
13 District Court if I had gotten this final judgment.

14 MR. KROG: We were very pleased to get  
15 that judgment, Your Honor. And based on the documents that  
16 we submitted to Judge Trauger, the motions that we've looked  
17 at, and we can go back and look at the statement of  
18 undisputed material facts if we wanted to. Those are in the  
19 record as exhibits here today from the motion for summary  
20 judgment. It was certainly our request that we obtain  
21 judgment on these common law claims that we've discussed as  
22 well. It was our impression that we had obtained judgment on  
23 those. And because there was a final judgment, as I said,  
24 Your Honor, there wasn't anything else that Judge Trauger  
25 could do with them. Now, if it had been summary

1 judgment - pardon me, a partial summary judgment.

2 If she had entered an interlocutory  
3 order, she could just -

4 THE COURT: Did you indicate to her that  
5 you were reserving any of the other claims?

6 MR. KROG: No, Your Honor. We had  
7 certain claims that were asserted against Mr. Donald Berge  
8 only, including the contract and the, it seems like  
9 cybersquatting and consumer protection act claim for damages.  
10 And then we had some claims that were being asserted against  
11 everybody else.

12 A number of those claims we expressly  
13 abandoned, either in the summary judgment motion itself or, I  
14 believe in one case, in the local rule 7.01 motion. The  
15 remaining claims remained pending and the Defendants have  
16 stipulated to that. If we would look at the stipulations  
17 filed in this case, one of the stipulations is a list of the  
18 claims that remained pending at the time of the judgment, at  
19 the time of our motion for summary judgment.

20 If Judge Trauger had done anything other  
21 than certify that judgment as final then Mr. Lefkovitz would  
22 have an argument that it didn't do anything that it doesn't  
23 say in black and white on its face. But because the judgment  
24 -

25 THE COURT: Maybe she erred. Did

1 you tell her that she might have made a mistake or did  
2 anybody tell her that she might have made a mistake or did  
3 anybody tell her there's some claims that you didn't address?

4 MR. KROG: Well, Your Honor -

5 THE COURT: Maybe she thought that was  
6 just enough.

7 MR. KROG: Well, Your Honor, the order  
8 grants the motion and it says that the Plaintiff has  
9 prevailed. So -

10 THE COURT: If I grant a judgment on - it  
11 seems to me I've written many, many opinions saying it's  
12 unnecessary to address the rest of the stuff because I've  
13 already found for the Plaintiffs or -

14 MR. KROG: Well, Your Honor would  
15 certainly do that and I'm sure Your Honor does it all the  
16 time in regards to alternative arguments for one claim. So,  
17 for here today we could have multiple reasons why we should  
18 win our claim under 523(A)(6) and Your Honor can say, well, I  
19 think the first reason is good enough, I'm not even going to  
20 talk about these other reasons because they get us to the  
21 same place. But claims in a suit are not analogous to  
22 multiple paths to the same conclusion, because each claim is  
23 its own thing so to speak, to use a very imprecise term. And  
24 each claim has to be resolved one way or another before a  
25 final judgment can be entered.

1                   And I think the only way that Your Honor  
2   could conclude that Judge Trauger's judgment didn't resolve  
3   the common law claims, despite being final -

4                   THE COURT:   Despite her saying it was  
5   final.

6                   MR. KROG:   Despite the Defendant's  
7   admission in his answer that it's final.   We would have to  
8   presume that Judge Trauger had erred, and of course, we never  
9   presume errors on the parts of courts.   When you go up for  
10  appeal you have to demonstrate error.   Appellate courts say  
11  we're not going to just, you know, presume that somebody did  
12  something wrong.

13                  THE COURT:   Well, at best, it's  
14  ambiguous, isn't it?

15                  MR. KROG:   I think it would be ambiguous,  
16  Your Honor, in isolation.   If all you had was the judgment  
17  and that was the only thing in the record then, no, you  
18  wouldn't be able to conclude from the face of the judgment  
19  itself that there were these other claims in the case and  
20  they've been decided in the Plaintiff's favor.

21                  But as we saw from the pieces that we  
22  mentioned, Your Honor, that's not the extent of the Court's  
23  collateral estoppel analysis.   The Court is supposed to look  
24  at the whole record, up to the whole record, to see what was  
25  at issue in the case.



1                   In the Miller versus Nichols Sixth  
2 Circuit said very plainly, that is not the law.

3                   THE COURT: Couldn't she just as easily  
4 have, I mean rather than say she made a finding that David  
5 was liable, couldn't she have just as easily, since she  
6 didn't mention it, conclude that the burden wasn't met on  
7 those?

8                   MR. KROG: Well, Your Honor, it is a  
9 (inaudible) world in which Judge Trauger could conclude that.  
10 But it is not the world in which this judgment was entered  
11 because there's nothing in the judgment that says the  
12 Plaintiff hasn't carried its burden on any claim.

13                  THE COURT: Is there anything in the  
14 judgment to say you've carried your burden on any claim?

15                  MR. KROG: Well, Your Honor, that the  
16 judgment was being entered, that it was being entered in  
17 response to the motion requesting judgment on a number of  
18 claims and -

19                  THE COURT: And she talked specifically  
20 about a few of them and she doesn't mention the others.

21                  MR. KROG: Not by name. But as we saw,  
22 there are parts of that judgment that don't relate to, in a  
23 large swath, they don't relate to the TCPA or the copyright.  
24 All the claims about Mr. David Berge and entities being  
25 enjoined from further use of the MarketGraphics system and

1 competition with MarketGraphics in Memphis, enjoining them  
2 from continuing to engage in market research, none of that is  
3 relief under the TCPA or the copyright act.

4                   The only thing that Judge Trauger could  
5 have enjoined Mr. Berge from doing under the TCPA would have  
6 been to stop engaging in unfair and deceptive acts. And if  
7 we go back and we look at the record, the unfair and  
8 deceptive acts for which she was holding Mr. Berge  
9 responsible was actually the sending of these blank  
10 verification letters from October 30, 31 and November 9.  
11 Those are what's referred to in the statement of undisputed  
12 and material facts.

13                   So, there's the large (inaudible) of  
14 judgment dealing with the competitive behavior. Those don't  
15 relate to the TCPA or the copyright. Those, Your Honor,  
16 evidence that, if nothing else, that she's deciding these  
17 other claims related to conspiracy, interference and unfair  
18 competition in the Plaintiff's favor. And, Your Honor, you  
19 can have an order that just says a motion is granted and  
20 grants everything that was requested. I can't conceive, and  
21 Mr. Lefkovitz hasn't pointed the Court to any example where a  
22 court enters an order that says here's all this relief and  
23 then -

24                   THE COURT: Maybe she concluded the  
25 damages would be the same no matter what, so she didn't need

1 to address them. I don't know. I can't go behind what she's  
2 done here.

3 MR. KROG: And I think the way to untie  
4 that Gordian knot, Your Honor, is Rule 58(B) certification.  
5 But she just didn't have the freedom to leave them hanging.

6 Now, the damages on these common law  
7 claims were - did overlap and they were the same damages, the  
8 same \$72,328. And so if those were simply multiple theories  
9 - for our purposes here, just as an example, Your Honor could  
10 conclude that we had shown non-dischargeability on any one of  
11 those common law claims or under the TCPA, and not on the  
12 other common law claims, and dismiss our claims for the ones  
13 we hadn't proven, and we would wind up with the same debt.  
14 But in that case - and even in that case, because -

15 THE COURT: I don't need to go there  
16 because if I agreed with you on the others, the ones she had  
17 explicitly ruled on, if I agreed with you on those, that's  
18 enough for (inaudible).

19 MR. KROG: I think that would probably be  
20 enough for (inaudible), Your Honor. The only issue is  
21 whether or not those were discrete claims in the District  
22 Court that could be left hanging. And I think the case law,  
23 and if Your Honor would like me to submit an additional brief  
24 on just this topic, I will be happy to do it.

25 THE COURT: I think we've got

1 enough paper.

2 MR. KROG: I agree with that. And I  
3 apologize for as much paper as we have but I think this is  
4 probably -

5 THE COURT: I've taken to using one of  
6 these so we don't kill all the trees.

7 MR. KROG: I wasn't confident that I  
8 would be able to navigate everything on my computer so we  
9 brought the paper, Your Honor. Maybe in the future we'll try  
10 to do it just on the screen.

11 THE COURT: I'm going to have to think  
12 about that. I mean I'm going to have to re-read her opinion  
13 and make my own decision about that.

14 MR. KROG: And, you know, Your Honor,  
15 (inaudible) but there was no paragraph in that judgment that  
16 says, you know, the Plaintiff is hereby awarded judgment on -

17 THE COURT: Each and every claim stated  
18 by -

19 MR. KROG: Each and every claim  
20 requested. And the notion, the principle is simply, if we  
21 look at Rule 7.01 motion, if we look at the motion for  
22 summary judgment, and we look at the committed fact that the  
23 final judgment as to Mr. Berge and it's not final to other  
24 parties in the case, that (inaudible) all the claims that  
25 remain pending against him. There is simply nothing else

1 that it could have done. If the minor premise is there are  
2 other parties still in the case and the major premise is the  
3 judgment is final as to Donald Berge, then the conclusion as  
4 a very basic syllogism is the judgment adjudicates all  
5 remaining claims as to David Berge.

6 THE COURT: Thank you.

7 MR. KROG: Thank you, Your Honor.

8 THE COURT: Mr. Lefkovitz, do you want to  
9 say anything about that?

10 MR. LEFKOVITZ: No, Your Honor, I think  
11 I've said enough today.

12 THE COURT: Well, we'll be back in touch  
13 with you in the next week or so, probably for oral opinion.

14 MR. LEFKOVITZ: Thank you, Your Honor.

15 THE COURT: We'll be adjourned.

16 (Proceedings concluded at 2:52p)

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REPORTER'S CERTIFICATE

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STATE OF TENNESSEE,

COUNTY OF DAVIDSON, to-wit:

I, Ann Woofter, hereby certify that I have  
taken down and transcribed the foregoing testimony of  
Lawrence Weitz, Ph.D., to the best of my skill and ability.

I further certify that I am not related by  
blood or marriage to any of the parties to this cause and  
that I have no interest, one way or the other, in the outcome  
of said cause.

Given under my hand this 12th day of May 2016.

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Ann Woofter, Certified Court Reporter  
TN Board of Court Reporting Lic. #290  
Notary Public, State of Tennessee  
My commission expires May 20, 2014